

## COMMENTS

**Res Judicata, State Adjudications, and the  
Telecommunications Act of 1996***Zachary R. Clark*<sup>†</sup>

## INTRODUCTION

The Telecommunications Act of 1996<sup>1</sup> (“1996 Act”) revolutionized telecommunications regulation in the United States. As part of this revolution, the Act transferred much of the states’ regulatory authority to the federal government in order to craft a new federal regime. Although the Act explicitly announced its removal of authority from the states,<sup>2</sup> the Act does not address a critical question created by this new regulatory scheme: To what extent do state adjudications of federal telecommunications-service regulation bind federal courts? The importance and difficulty of answering this question should not be understated. On one hand, *res judicata*—which prevents litigants from having a second bite at the apple—has long been a cornerstone of the judicial system in the United States.<sup>3</sup> On the other, the radical changes made by the Act require a uniform federal policy to accomplish their purpose of creating a competitive national telecommunications market. In addition, both the Act’s explicit restrictions on and its preservation of the states’ authority would be undermined by *res judicata*. The decisive question is whether Congress intended federal courts to be bound by state adjudications of the Act.

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<sup>†</sup> BA 2012, The University of Kansas; JD Candidate 2016, The University of Chicago Law School.

<sup>1</sup> Pub L No 104-104, 110 Stat 56, codified as amended in various sections of Titles 15, 18, and 47.

<sup>2</sup> See, for example, 47 USC § 253(a) (“No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”).

<sup>3</sup> See *San Remo Hotel, LP v City and County of San Francisco, California*, 545 US 323, 336–37 (2005) (describing the history and purpose of *res judicata* in the United States).

Careful examination of the Act's history, purpose, and structure reveals that Congress did not.

Before the 1996 Act, the telecommunications-service market was regulated—primarily by the individual states—as a natural monopoly.<sup>4</sup> Congress's passage of the Act reflected a recognition that competition in the telecommunications-service market was both possible and desirable. Congress intended the Act to spur the transition from monopoly to competition through the creation of a uniform national regulatory policy. Uniformity is essential because it corrects the critical flaws of prior monopoly regulation: local and state protection of monopolists, and artificial rate setting that encouraged arbitrage and inefficiency. To implement and maintain this uniform national regulatory policy, the Act transferred much of the states' authority to the Federal Communications Commission (FCC). The Act preserved the states' authority only with regard to certain public-welfare issues and further mandated that states could regulate only in accordance with federal law. Thus, the Act fundamentally restructured telecommunications regulation in two ways: by promoting competition as opposed to monopoly and by shifting primary regulatory responsibility from the states to the federal government.

Courts have recognized these great changes wrought by the Act but have not resolved whether interpretations of the Act made through state adjudications bind federal courts. Federal courts accord state adjudications preclusive effect based on two different sources: federal common law (in the case of state agency adjudications) and 28 USC § 1738, the full faith and credit statute<sup>5</sup> (in the case of state court decisions). Federal common law may be overcome only if preclusion is inconsistent with congressional intent.<sup>6</sup> Section 1738 is inapplicable only if Congress has "clearly manifest[ed]" such intent—a similar but heightened standard.<sup>7</sup>

To date, federal court decisions are inconsistent as to whether federal common law grants preclusive effect to state

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<sup>4</sup> See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rec 15499, 15508 ¶ 11 (1996) (recognizing that the telecommunications-service market has been "traditionally . . . viewed as creating a natural monopoly"). A natural monopoly exists when one firm "can supply the market at lower cost than can two or more firms," such that the market will naturally create a monopoly. Daniel F. Spulber, *Deregulating Telecommunications*, 12 Yale J Reg 25, 31–32 (1995).

<sup>5</sup> Act of May 26, 1790, 1 Stat 122, codified as amended at 28 USC § 1738.

<sup>6</sup> See *Astoria Federal Savings & Loan Association v Solimino*, 501 US 104, 108 (1991).

<sup>7</sup> *Kremer v Chemical Construction Corp.*, 456 US 461, 477 (1982).

agency adjudications; as for § 1738, courts have either applied it or avoided the issue altogether. Thorough examination of the Act, however, suggests that federal common law preclusion should not apply to state adjudications of federal law issues involving the Act or to the regulation of telecommunications services. Although implied repeal is rarely found,<sup>8</sup> the Act nevertheless demonstrates strong qualities suggesting that partial implied repeal of § 1738 may in fact be possible as well. This Comment aims to demonstrate Congress's intent that federal courts review federal law issues in this context—without being bound by prior state adjudications. Allowing state adjudications to preclude federal review would result in uneven and arbitrary implementation of federal telecommunications policy—the very problem that the Act was designed to solve.<sup>9</sup> Furthermore, res judicata in this context would conflict with the Act's explicit limitations on state authority and undermine the Act's preservation of state authority to regulate certain issues. Altogether, the Act's purpose and provisions show that Congress did not intend for state adjudications to have preclusive effect in federal courts. Accordingly, neither federal common law preclusion nor § 1738 should bar federal review.

Without federal review, states could impede and upset both telecommunications-service competition and innovation. For example, imagine that a new form of communication technology has arisen called quantum calling. Quantum calling uses quantum entanglement<sup>10</sup> to make voice calls. A state agency decides through adjudication that quantum calling is a telecommunications service and is therefore subject to intrastate access charges. As a result, the cost of providing quantum calling (an already-expensive service, given its reliance on cutting-edge technology) increases dramatically. Because of this increase, consumer demand plummets and companies cancel plans to invest in and expand quantum-calling networks. If the state agency adjudication is res judicata, then neither the agency's decision that it has

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<sup>8</sup> See *Branch v Smith*, 538 US 254, 293 (2003) (O'Connor concurring in part and dissenting in part) (observing that the Supreme Court has "not found *any* implied repeal of a statute since 1975") (emphasis in original). The Court has not found implicit repeal since *Branch* either.

<sup>9</sup> See Part I.B.

<sup>10</sup> Quantum entanglement is the linkage of the state of two atoms. It is theorized that quantum entanglement could allow for the transmission of information faster than the speed of light. See generally Zeeya Merali, *Quantum 'Spookiness' Passes Toughest Test Yet*, 525 Nature 15 (Sept 3, 2015).

the authority to make such a classification nor the classification itself can be challenged in federal court. Even if such decisions are blatant violations of federal law, a federal court will be powerless to intervene. Ultimately, the goals of the 1996 Act—increasing competition, reforming intercarrier compensation, and promoting universal service—are undermined, government intervention in the market creates inefficiency, and consumers suffer.<sup>11</sup>

To understand and evaluate Congress's intent, Part I details the history of telecommunications regulation. This includes the regulatory history prior to the Act, the purpose of the Act itself, and how the Act was designed to function. Part II sets forth the underpinnings of *res judicata* based on both the federal common law and § 1738. It lays out the courts' current, inconsistent stances on the application of *res judicata* to state adjudications involving the Act. Building on this foundation, Part III examines whether the congressional intent embodied in the Act—namely, in the Act's purpose, limitations on state authority, and preservation of state authority—is consistent with giving state adjudications preclusive effect in federal court under either federal common law or § 1738. Finally, based on the evaluation of the Act in Part III, Part IV extrapolates the general characteristics that may indicate when *res judicata* is inapplicable to state adjudications of federal regulatory regimes.

## I. THE TELECOMMUNICATIONS ACT OF 1996

The 1996 Act revolutionized telecommunications regulation in the United States. The Act's three primary objectives were to increase local and long-distance competition, reform intercarrier compensation, and promote universal service.<sup>12</sup> To accomplish these goals, the Act transferred regulatory authority from the states to the federal government in order to create and implement a uniform national regulatory scheme.<sup>13</sup> Accordingly, the

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<sup>11</sup> While quantum calling may sound far-fetched, this hypothetical parallels the Iowa Utilities Board's actual classification of voice-over-Internet-protocol calls as telecommunications services and its approval of access charges. See *Sprint Communications Co v Jacobs*, 798 F3d 705, 706 (8th Cir 2015).

<sup>12</sup> See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rec 15499, 15505–07 ¶¶ 3, 6–8 (1996) (explaining the goals of the reform and methods to accomplish them).

<sup>13</sup> See 74 Am Jur 2d Telecomm § 15 at 298 (2012) (“Congress enacted the [Act] to provide a . . . deregulatory national policy framework . . . [and] reduce impediments to the development of telecommunication facilities imposed by local governments.”).

Act leaves states the authority to regulate intrastate telecommunications only so long as such regulations are consistent with the Act and federal policy.<sup>14</sup> To fully understand the Act and the relationship it established between the federal government and the states, it is essential to understand both the history of telecommunications regulation before the Act as well as the Act's goals and structure.

#### A. Telecommunications Regulation before the 1996 Act

Prior to the Act, competition among local carriers was non-existent.<sup>15</sup> Telephone service was considered a natural monopoly.<sup>16</sup> AT&T had successfully convinced regulators that a single carrier was both necessary to achieve universal service—the provision of telephone service to all Americans—and more efficient than competition.<sup>17</sup> Thus, carriers (originally Bell Telephone Company, and later AT&T and the regional Baby Bells<sup>18</sup>) became state-sanctioned monopolists who were regulated only to protect consumers from monopolist rent-seeking—not to ensure competition.<sup>19</sup> Regulators set carriers' rates based primarily on

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<sup>14</sup> See *MCI Telecommunication Corp v Bell Atlantic-Pennsylvania*, 271 F3d 491, 497–98 (3d Cir 2001). See also 47 USC § 254(f) (prohibiting the states from adopting any regulations “inconsistent with the Commission’s rules to preserve and advance universal service”).

<sup>15</sup> See *MCI Telecommunication*, 271 F3d at 498 (“In each local service area, the states would grant a monopoly franchise to one local exchange carrier.”).

<sup>16</sup> See Glen O. Robinson and Thomas B. Nachbar, *Communications Regulation* 439–41 (Thomson/West 2008) (outlining the history of telecommunications competition from the invention of the telephone until the 1930s). For a narrative history of the telecommunications industry and telecommunications regulation, see generally Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* (Knopf 2010).

<sup>17</sup> Robinson and Nachbar, *Communications Regulation* at 440–41 (cited in note 16).

<sup>18</sup> The Bell Telephone Company's monopoly over local and long-distance calls was broken up by court order in 1984. As a result, Bell's long-distance service became AT&T, and its newly divested regional operating companies became known collectively as the Baby Bells. See Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications under Judge Greene*, 50 Hastings L J 1395, 1404–20 (1999) (outlining the litigation history that broke up the company).

<sup>19</sup> Robinson and Nachbar, *Communications Regulation* at 441 (cited in note 16). An example of monopoly regulation prior to the Act is rate of return regulation, which limited how much carriers could charge consumers. Such regulation sought only to prevent monopoly profits, not to ensure that rates were actually at competitive levels. Because the rates were designed not to mimic a competitive market but instead simply to control profits, rate of return regulation actually discouraged firms from engaging in the socially beneficial behaviors that come from competition. See *In the Matter of Policy and Rules concerning Rates for Dominant Carriers*, 4 FCC Rec 2873, 2889–90 ¶¶ 29–30 (1989) (discussing how rate regulation can lead firms to inefficiently increase investments in order to boost profits). See also Robinson and Nachbar, *Communications Regulation* at 480

carriers' self-reported costs of providing service, meaning that higher costs resulted in higher profits.<sup>20</sup> Unsurprisingly, such regulation led to widespread inefficiency and arbitrage.<sup>21</sup> The FCC itself had no control over intrastate service;<sup>22</sup> only states had the authority to grant exclusive rights in each local service area to a local carrier, who would then manage the entire local network.<sup>23</sup>

At the same time, the intercarrier-compensation system was rife with inefficiencies due to ad hoc and uneven regulation. For any intrastate calls that were handled by more than one carrier—that is, for any calls in which the caller and the call recipient had different service providers—the caller's network would pay the recipient's carrier for the traffic.<sup>24</sup> Most long-distance calls were also handled by multiple carriers—a local carrier would start the call, a long-distance carrier would transport the call to the recipient's local network, and the recipient's local network would bring the call to its final destination.<sup>25</sup> For these multicarrier calls, carriers would pay each other access charges for their specific roles in originating, transporting, and terminating the calls.<sup>26</sup> Because of its artificially set rates, the intercarrier-compensation system created boundless opportunities for carriers to engage in arbitrage and inefficient rent-seeking behavior.<sup>27</sup>

This ad hoc intercarrier-compensation system was intended both to compensate carriers for their roles in the calls and to

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(cited in note 16) (describing the purpose of rate regulation as “protect[ing] consumers against monopoly overcharge”).

<sup>20</sup> *In the Matter of Policy and Rules concerning Rates for Dominant Carriers*, 4 FCC Rec at 2889–90 ¶¶ 29–31.

<sup>21</sup> See *id.* (detailing how rate of return regulation incentivized carriers to engage in unnecessary or inefficient improvements and to allocate costs to their telecommunications services in order to boost carriers' profits, because these profits were based on the cost to deliver services and regulators relied on carriers to report this information accurately).

<sup>22</sup> See *AT&T Corp v Iowa Utilities Board*, 525 US 366, 403–04 (1999) (Thomas concurring in part and dissenting in part) (describing the limited authority that the FCC had to regulate interstate services prior to the 1996 Act).

<sup>23</sup> Robinson and Nachbar, *Communications Regulation* at 556 (cited in note 16).

<sup>24</sup> *Id.* at 503–05.

<sup>25</sup> *Id.* at 503–04.

<sup>26</sup> *Id.*

<sup>27</sup> See *In the Matter of Connect America Fund*, 26 FCC Rec 17663, 17669 ¶ 9 (2011) (“Over time, [intercarrier compensation] has become riddled with inefficiencies and opportunities for wasteful arbitrage.”). For example, because certain kinds of traffic were compensated at higher rates, carriers were incentivized to artificially inflate traffic volume and to otherwise remove call information to avoid paying other carriers. See *id.* at 17676 ¶ 33 (detailing the FCC's reforms taken to decrease the exploitation of the intercarrier-compensation system).

subsidize carriers serving high-cost and rural areas as a means of ensuring that all Americans had access to telephone service.<sup>28</sup> The intercarrier-compensation system's flaws, however, were fundamentally at odds with universal service.<sup>29</sup> Artificial rate setting deterred carriers from moving to cheaper, more efficient Internet-protocol networks.<sup>30</sup> The system also resulted in higher rates for small carriers, further incentivized carriers to engage in rent-seeking and arbitrage, and created costly compensation disputes.<sup>31</sup>

## B. The 1996 Act

Congress passed the 1996 Act to fundamentally restructure telecommunications-service markets. Through technological advances, it became apparent in the 1990s that competition was both possible and desirable.<sup>32</sup> Local markets, however, were still dominated by state-sanctioned monopolies.<sup>33</sup> At the same time, intercarrier compensation became widely regarded as extremely inefficient, both as a means for carriers to compensate each other and as a pathway to universal service.<sup>34</sup> Accordingly, the Act was intended to open local and long-distance markets to competition,

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<sup>28</sup> Robinson and Nachbar, *Communications Regulation* at 529–30 (cited in note 16).

<sup>29</sup> See *In the Matter of Connect America Fund*, 26 FCC Rec at 17669 ¶ 9 (describing how the intercarrier-compensation system resulted in “millions of Americans paying more on their wireless and long distance bills than they should in the form of hidden, inefficient charges”).

<sup>30</sup> Id (“The existing system . . . is also fundamentally in tension with and a deterrent to deployment of [Internet-protocol] networks. The system creates competitive distortions because traditional phone companies receive implicit subsidies from competitors for voice service, while wireless and other companies largely compete without the benefit of such subsidies.”).

<sup>31</sup> See id (“[Intercarrier-compensation] revenues have become dangerously unstable, impeding investment, while costly disputes and arbitrage schemes have proliferated.”).

<sup>32</sup> See *Telecommunications Competition and Deregulation Act of 1995: Report of the Committee on Commerce, Science, and Transportation on S 652*, S Rep No 104-23, 104th Cong, 1st Sess 2 (1995) (noting that “[c]hanges in technology and consumer preferences,” along with the emergence of competition, had made the previous regulatory regime “a historical anachronism”). See also Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 29 Conn L Rev 123, 125–31 (1996) (describing the changes in technology and competition that led to the passage of the Act).

<sup>33</sup> Robinson and Nachbar, *Communications Regulation* at 556–57 (cited in note 16).

<sup>34</sup> See *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rec 9610, 9616–18 ¶¶ 11–18 (2001); *In the Matter of Access Charge Reform*, 12 FCC Rec 15982, 15994–96 ¶¶ 28–31 (1997).

promote universal service, and reform intercarrier compensation—each goal essential to the success of the others.<sup>35</sup>

First, Congress intended the Act to enhance competition.<sup>36</sup> The 1996 Act “requires that local service . . . be opened to competition according to standards established by federal law.”<sup>37</sup> Congress imposed obligations on existing local carriers to permit new, competitive carriers to access their networks according to regulations set by the FCC.<sup>38</sup> The Act preserves state access regulations only so long as they are consistent with the Act’s requirements.<sup>39</sup> The Act also places explicit restrictions on how states can regulate carriers because of concerns that state regulation may undermine procompetitive federal policies.<sup>40</sup> Specifically, the Act forbids states from enacting or enforcing any regulation that “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>41</sup>

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<sup>35</sup> See Robinson and Nachbar, *Communications Regulation* at 500–01 (cited in note 16).

<sup>36</sup> See *Telecommunications Act of 1996*, S Rep No 104-230, 104th Cong, 2d Sess 1 (1996) (describing the Act’s purpose to “open[] all telecommunications markets to competition”). See also *Verizon Maryland Inc v Public Service Commission of Maryland*, 535 US 635, 638 (2002) (describing how the Act was “designed to foster competition”).

<sup>37</sup> *MCI Telecommunication*, 271 F3d at 497.

<sup>38</sup> See 47 USC § 251.

<sup>39</sup> See, for example, 47 USC § 253(d):

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

<sup>40</sup> See Robinson and Nachbar, *Communications Regulation* at 556 (cited in note 16) (noting that, to achieve the Act’s goals, “it was considered necessary to develop a comprehensive federal scheme that in significant degree preempted state regulatory discretion to the extent it might impede the overall congressional policy”).

<sup>41</sup> 47 USC § 253(a). See also, for example, *Sprint Telephony PCS, LP v County of San Diego*, 490 F3d 700, 715–16 (9th Cir 2007) (finding that 47 USC § 253(a) preempted a county ordinance that imposed onerous “permitting structure and design requirements”); *City of Portland, Oregon v Electric Lightwave, Inc*, 452 F Supp 2d 1049, 1062–65 (D Or 2005) (holding that a city’s requirements that a carrier sell services to the city at the “most-favored rate” and allow the city to use the carrier’s ducts and cables violated § 253(a)); *TCG New York, Inc v City of White Plains*, 305 F3d 67, 76–82 (2d Cir 2002) (invalidating city ordinances and contract provisions that imposed burdensome disclosure requirements, mandated that carriers waive the ability to mount legal challenges, and required carriers to offer rates “on terms that [were] at least as good as the terms TCG offer[ed] to any other governmental or non-profit customer” in the area).



Second, the 1996 Act transformed universal-service funding by mandating the elimination of implicit intercarrier-compensation subsidies. In place of these subsidies, Congress ordered the FCC to make federal universal-service support “explicit.”<sup>42</sup> To accomplish this reform, the Act mandated the creation of the Federal-State Joint Board.<sup>43</sup> The board—composed of federal regulators and state utility commissioners<sup>44</sup>—is tasked with creating universal-service reform recommendations according to the principles of the Act.<sup>45</sup> The Act requires the FCC to implement the board’s recommendations.<sup>46</sup> Moreover, the Act prohibits states from independently adopting any regulations “inconsistent with the Commission’s rules to preserve and advance universal service.”<sup>47</sup> The states’ authority to adopt additional universal-service regulations is further restricted so that any regulation must be “specific” and “predictable,” and it must not “rely on or burden Federal universal service support mechanisms.”<sup>48</sup>

Third, the Act created a new federal regime to manage intercarrier compensation. Instead of paying each other access charges established by regulatory formulas,<sup>49</sup> the 1996 Act requires carriers to instead negotiate reciprocal-compensation agreements<sup>50</sup> based on the actual costs of delivering traffic to one another.<sup>51</sup> State agencies have the authority to arbitrate these agreements according to standards set by the Act.<sup>52</sup> In addition, states are allowed to enforce their own laws when reviewing agreements only if doing so is in accordance with the Act.<sup>53</sup> If a state fails to act, the FCC has the authority to step in and review the agreement.<sup>54</sup>

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<sup>42</sup> 47 USC § 254(e).

<sup>43</sup> 47 USC §§ 254(a), 410(c).

<sup>44</sup> 47 USC § 410(c).

<sup>45</sup> 47 USC § 254(a)(1), (b).

<sup>46</sup> 47 USC § 254(a)(2).

<sup>47</sup> 47 USC § 254(f).

<sup>48</sup> 47 USC § 254(f).

<sup>49</sup> See Robinson and Nachbar, *Communications Regulation* at 503–05 (cited in note 16) (describing the history of access-charge regulation prior to the Act).

<sup>50</sup> 47 USC § 251(b)(5), (c)(1).

<sup>51</sup> 47 USC § 252(d)(2)(A) (permitting state commissions to find that the terms of the reciprocal-compensation agreements are “just and reasonable” only if the costs are a “reasonable approximation” of the expected costs).

<sup>52</sup> 47 USC § 252(c) (listing the criteria that state agencies must apply when arbitrating interconnection agreements).

<sup>53</sup> 47 USC § 252(e)(3).

<sup>54</sup> 47 USC § 252(e)(5):

The components of the Act's "trilogy" of goals—promoting competition, enhancing universal service, and reforming inter-carrier compensation—are "integrally related."<sup>55</sup> For example, if universal-service funding is done improperly, it can create market distortions by subsidizing inefficient or uncompetitive carriers, thus harming the Act's competition goals. Similarly, overly restrictive local regulation impedes the ability of competitive carriers to enter markets, in turn hindering universal service. Intercarrier compensation affects all of this as it can increase carriers' costs of providing service, which can both harm universal service by decreasing carriers' service provision and decrease competition by limiting carriers' entry into new markets.<sup>56</sup> Accordingly, "[o]nly when all parts of the trilogy are complete will the task of adjusting the regulatory framework to fully competitive markets be finished."<sup>57</sup>

Congress intended the federal courts and the FCC to oversee and manage this new regulatory system.<sup>58</sup> States are left with the authority to regulate only intrastate retail-level services, and even then only in accordance with federal policy.<sup>59</sup> Furthermore, the Act gives the FCC the authority to preempt any state and local laws that impede competition,<sup>60</sup> allows aggrieved

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If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

<sup>55</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rec at 15505–07 ¶¶ 3–8 (discussing the goals of the 1996 Act).

<sup>56</sup> See *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rec at 9623 ¶¶ 31–32. See also Part III.A (describing how altering the congressional scheme would likely impact the Act's ability to achieve Congress's goals).

<sup>57</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rec at 15507 ¶ 9.

<sup>58</sup> See *Southwestern Bell Telephone Co v Connect Communications Corp.*, 225 F3d 942, 948 (8th Cir 2000) (concluding that Congress intended federal courts to have jurisdiction to review federal law issues related to the Act in the interests of federal uniformity); *AT&T Corp.*, 525 US at 378 n 6 (finding that Congress intended the federal courts and the FCC to oversee and manage telecommunications-service regulation under the Act).

<sup>59</sup> See 47 USC §§ 251(d)(3), 252(e)(3), 253(a)–(b), 254(f). See also *Global NAPs, Inc v Massachusetts Department of Telecommunications and Energy*, 427 F3d 34, 46–48 (1st Cir 2005) (describing the authority left to the states and the federal government's "extensive oversight role").

<sup>60</sup> 47 USC § 253(d) ("If . . . the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates

parties to seek federal review of certain state agency decisions,<sup>61</sup> and grants federal courts subject matter jurisdiction to review state compliance with the Act.<sup>62</sup>

This federal supervision is necessary to accomplish the goals of the Act because it allows for the creation of a uniform system. State-by-state regulation is inefficient and costly.<sup>63</sup> States are ineffective regulators of telecommunications services for a variety of reasons. First, modern telecommunications services, and the carriers that provide such services, are inherently interstate.<sup>64</sup> State-by-state regulation of these national networks and carriers is therefore incomplete.<sup>65</sup> Second, state-by-state regulation increases carriers' compliance costs, because carriers must keep track of and work with fifty different state regulators and regulatory regimes.<sup>66</sup> Regulatory uncertainty and instability reduce carrier investment and innovation.<sup>67</sup> Finally, the "most fundamental problem" with state-by-state regulation is that

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... this section, the Commission shall preempt [its] enforcement . . . to the extent necessary to correct such violation or inconsistency.").

<sup>61</sup> 47 USC § 252(e)(6) ("In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court.").

<sup>62</sup> See *Verizon Maryland*, 535 US at 643–44.

<sup>63</sup> See *AT&T Corp.*, 525 US at 378 n. 6. See also Charles J. Cooper and Brian Stuart Koukoutchos, *Federalism and the Telephone: The Case for Preemptive Federal Deregulation in the New World of Intermodal Competition*, 6 J Telecomm & High Tech L 293, 343–59 (2008) (asserting that "state-by-state regulation is fundamentally incompatible with modern wireline telephony" and that as a result the remaining state regulatory authority "must be carefully policed by the FCC and the federal courts").

<sup>64</sup> See Cooper and Koukoutchos, 6 J Telecomm & High Tech L at 344–54 (cited in note 63) (noting that new technological innovations, such as wireless communications systems and high-speed data access, have increased intermodal competition, have decreased the importance of state and regional boundaries, and require a federal regulatory solution rather than a state one).

<sup>65</sup> Id at 353–54 (arguing that state regulation of national industries imposes negative externalities on other consumers, and asserting that telecommunications-service regulation is incompatible with a state-by-state regulatory regime because telecommunications operators no longer operate on a state-by-state basis).

<sup>66</sup> See id at 352–55 (showing that the FCC found inconsistent regulation of the cable industry to dampen investment and reasoning that a lack of "regulatory uniformity" will decrease capital investment for telephony). See also *Communications Act of 1995*, HR Rep 104-204(I), 104th Cong, 1st Sess 94 (1995):

The Committee finds that current State and local requirements . . . have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of [advanced services]. . . . The Committee believes it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible.

states are unable to manage and address externalities that extend beyond state boundaries.<sup>68</sup>

For example, if one state or locality enacts regulation that hinders competition—such as by denying a carrier a permit to build cellular towers in a new market—it can negatively impact competition in other areas.<sup>69</sup> If states and localities regulate in such a way that creates competitive advantages for one carrier, then that carrier can use those benefits either to cross subsidize its services in other, more competitive markets, or to extract monopoly profits through the creation of a terminating-access monopoly. These incidental advantages afforded to some carriers through inconsistent regulation in local markets can therefore have a broader impact on other localities and states.<sup>70</sup>

It is important to note, however, that the Act does not require *complete* uniformity in *all* telecommunications regulation. Only the overarching national policies regarding competition, inter-carrier compensation, and universal service must be uniform. The Act explicitly leaves states the authority to implement their own individual regulations so long as they do not interfere with federal policies.<sup>71</sup> Thus, the Act can most appropriately be thought of as setting the federal framework that the states must operate within—a framework broad enough in some respects that states may even take varying approaches to similar issues.<sup>72</sup> Accordingly, from the beginning the FCC has characterized the 1996 Act as “craft[ing] a partnership . . . under [which] the FCC establishes uniform national rules for some issues, the states, and in some instances the FCC, administer these rules,

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<sup>67</sup> See Cooper and Koukoutchos, 6 J Telecomm & High Tech L at 352 (cited in note 63).

<sup>68</sup> Id at 353–54 (noting not only that state regulation will impose costs on other nonstate users but also that state regulators lack an incentive to take such costs into account when making decisions).

<sup>69</sup> See id.

<sup>70</sup> See id (asserting that the “fundamental problem with [ ] state regulation” is the states’ inability to understand and address externalities).

<sup>71</sup> See, for example, 47 USC § 253(b):

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

<sup>72</sup> See *Global NAPs*, 427 F3d at 46 (“The model under the [Act] is to divide authority among the FCC and the state commissions in an unusual regime of ‘cooperative federalism,’ with the intended effect of leaving state commissions free, *where warranted*, to reflect the policy choices made by their states.”) (emphasis added) (citations omitted).

and the states adopt additional rules that are critical to promoting local telephone competition.”<sup>73</sup>

In sum, the 1996 Act embodies Congress’s goal of transforming the telecommunications-service market by establishing national regulations that encourage competition, reform inter-carrier compensation, and strengthen universal service. To accomplish these tasks, the Act emboldened the federal government and federal courts to oversee and manage this new regime. Furthermore, the Act mandated that the limited discretion retained by the states be exercised only in accordance with federal policy.

## II. THE UNRESOLVED ISSUE OF RES JUDICATA AND THE 1996 ACT

Although the courts have decided many issues related to the 1996 Act, it is unresolved whether state adjudications of the Act preclude review in federal court. The doctrine of res judicata holds that once a claim or issue has been litigated, such judgment is final and may not be relitigated.<sup>74</sup> Res judicata “relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication.”<sup>75</sup> When federal courts apply res judicata effect to state judgments, the doctrine “also promote[s] the comity between state and federal courts.”<sup>76</sup>

Federal courts generally apply res judicata to state adjudications in two different ways. First, federal common law determines the preclusive effect of state agency adjudications in federal court.<sup>77</sup> Under the common law, a basic presumption of preclusion applies unless preclusion of federal review would conflict with

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<sup>73</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rec at 15513 ¶ 24.

<sup>74</sup> See Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, 18 *Federal Practice and Procedure* § 4401 at 4 (West 2d ed 2002 & Supp 2015). Note that claim preclusion (which prevents parties to litigation and their privies from relitigating a specific claim) and issue preclusion (which bars other parties from relitigating a legal issue) are two different forms of res judicata. Issue preclusion is also known as “collateral estoppel,” which is occasionally referred to as being distinct from res judicata. Res judicata, however, may include both claim preclusion and collateral estoppel. See id at § 4402 at 8.

<sup>75</sup> *Allen v McCurry*, 449 US 90, 94 (1980).

<sup>76</sup> Id at 96, citing *Younger v Harris*, 401 US 37, 43–45 (1971).

<sup>77</sup> See *Astoria Federal Savings & Loan Association v Solimino*, 501 US 104, 107–09 (1991).

Congress's intent.<sup>78</sup> The courts are divided on whether federal common law preclusion applies to claims involving the 1996 Act or other federal law.<sup>79</sup>

Second, the full faith and credit statute, § 1738, mandates that federal courts afford state court judgments the same preclusive effect that those judgments would have in state court. Section 1738 is inapplicable only if a subsequent statute contains either an explicit or implied partial repeal. Implicit repeal requires that the subsequent statute clearly manifest Congress's intent and that it create an irreconcilable conflict with § 1738.<sup>80</sup> Aside from one instance in which the court avoided the issue, all federal courts have applied § 1738 and *res judicata* to state court judgments involving the Act.<sup>81</sup> The courts, however, have yet to be squarely presented with the question whether the Act implicitly repeals § 1738.

To explain the current state of the law on these issues, Part II.A discusses federal common law preclusion and the courts' treatment of common-law preclusion in relation to the 1996 Act. Part II.B then examines the courts' application of § 1738 to the Act.

#### A. State Agency Adjudications, Federal Common Law, and the Courts' Inconsistent Applications of *Res Judicata*

Federal common law governs the preclusive effect of state agency adjudications in federal court.<sup>82</sup> To determine whether

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<sup>78</sup> See *id.* at 109–10 (applying a general presumption of preclusive effect to state agency adjudications when “Congress has failed expressly or impliedly to evince any intention on the issue”).

<sup>79</sup> Compare *Global NAPs, Inc v Massachusetts Department of Telecommunications and Energy*, 427 F3d 34, 48–49 (1st Cir 2005), with *Verizon Maryland Inc v RCN Telecom Services, Inc*, 232 F Supp 2d 539, 548–50 (D Md 2002), *revd in part on other grounds, Verizon Maryland, Inc v Global NAPs, Inc*, 377 F3d 355, 369 (4th Cir 2004) (holding that preclusion does not bar judicial review).

<sup>80</sup> See *Posadas v National City Bank*, 296 US 497, 503 (1936):

There are two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.

<sup>81</sup> See Part II.B. See also *Sprint Communications Co v Jacobs*, 798 F3d 705, 707–09 (8th Cir 2015).

<sup>82</sup> See *University of Tennessee v Elliott*, 478 US 788, 794 (1986):

Title 28 U.S.C. § 1738 governs the preclusive effect to be given the judgments and records of state courts, and is not applicable to the unreviewed state administrative factfinding at issue in this case. However, we have frequently fashioned federal common-law rules of preclusion in the absence of a governing statute.

the federal common law requires *res judicata*, “the question is not whether administrative estoppel is wise but whether it is intended by the legislature.”<sup>83</sup> Thus, to overcome federal common law preclusion, parties must show that “a common-law rule of preclusion would be [in]consistent with Congress’ intent in enacting [the statute].”<sup>84</sup> Using this analysis, the Supreme Court has held that state agency decisions do not preclude racial discrimination claims brought under Title VII of the Civil Rights Act of 1964<sup>85</sup> or claims brought under the Age Discrimination in Employment Act of 1967,<sup>86</sup> but it has held that they bar actions brought under 42 USC § 1983.<sup>87</sup> Circuit courts have interpreted the Supreme Court’s precedent to mean that federal common law preclusion can be overcome “if the effect of the state court judgment or decree is to restrain the exercise of the United States’ sovereign power by imposing requirements that are contrary to important and established federal policy.”<sup>88</sup>

Since the passage of the 1996 Act, federal courts have differed widely in their applications of *res judicata* to state agency adjudications related to the Act. In *AT&T Corp v Iowa Utilities Board*,<sup>89</sup> the Supreme Court addressed federal review of state agency decisions in a footnote.<sup>90</sup> The primary issue in the case was whether the FCC’s methodology to set interconnection rates was reasonable.<sup>91</sup> In turn, this hinged on whether the FCC had the authority to issue rules setting intrastate rates.<sup>92</sup> While both parties agreed that the 1996 Act preempted most state

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<sup>83</sup> *Astoria*, 501 US at 108.

<sup>84</sup> *Id* at 110, quoting *Elliott*, 478 US at 796.

<sup>85</sup> Pub L No 88-352, 78 Stat 253, codified as amended at 42 USC § 2000e et seq.

<sup>86</sup> Pub L No 90-202, 81 Stat 602, codified as amended at 29 USC § 621 et seq.

<sup>87</sup> Compare *Elliott*, 478 US at 795–96 (holding that state agency decisions did not preclude federal review of Title VII claims), and *Astoria*, 501 US at 112–14 (holding that Congress did not intend for state judgments to have preclusive effect under the Age Discrimination in Employment Act), with *Elliott*, 478 US at 797–99 (finding that for § 1983 claims “federal courts must give the agency’s factfinding the same preclusive effect to which it would be entitled in the State’s courts”).

<sup>88</sup> *Arapahoe County Public Airport Authority v Federal Aviation Administration*, 242 F3d 1213, 1219 (10th Cir 2001). See also *American Airlines, Inc v Department of Transportation*, 202 F3d 788, 800–01 (5th Cir 2000) (holding that state court rulings were not preclusive, because the federal interest in consistent aviation laws was strong enough to overcome the application of the “full faith and credit principles”).

<sup>89</sup> 525 US 366 (1999).

<sup>90</sup> *Id* at 378 n 6.

<sup>91</sup> *Id* at 374 & n 3.

<sup>92</sup> *Id* at 374.

regulation,<sup>93</sup> they disputed whether that preemption extended to local rate setting. AT&T contended that the plain language of the Act granted the FCC such authority under 47 USC § 251,<sup>94</sup> while the Iowa Utilities Board asserted that the Act left the states with authority over local rate setting and otherwise failed to express sufficient intent to overcome the presumption in favor of local regulation of public welfare.<sup>95</sup> To resolve this issue, the Court examined the Act's division of authority between the states and the federal government. The Court found that "a federal program administered by 50 independent state agencies is surpassing strange."<sup>96</sup> The Court further explained that "[t]his is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew."<sup>97</sup> Ultimately, the Court concluded that "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel."<sup>98</sup>

Consistent with *AT&T Corp.*, both the First and the Eighth Circuits have held that state agency adjudications related to the interpretation and application of the 1996 Act do not bar federal review. In *Global NAPs, Inc v Massachusetts Department of Telecommunications and Energy*,<sup>99</sup> the First Circuit considered whether an interpretation of an interconnection agreement by the Rhode Island Public Utilities Commission bound other state agencies under federal common law.<sup>100</sup> The court engaged in detailed analysis of the Act's purpose as well as its structure.<sup>101</sup> The court found that one of the "overriding aims of the [Act] was to introduce competition into the market for local telephone service," which had previously been dominated by state-regulated

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<sup>93</sup> Compare Brief of Petitioners AT&T et al, *AT&T Corp v Iowa Utilities Board*, Docket No 97-826, \*20-32 (US filed Apr 3, 1998) (available on Westlaw at 1998 WL 401522) ("Petitioners' Brief"), with Joint Brief for State Commission Respondents and the National Association of Regulatory Utility Commissioners, *AT&T Corp v Iowa Utilities Board*, Docket No 97-826, \*16 (US filed May 18, 1998) (available on Westlaw at 1998 WL 267886) ("Respondents' Brief").

<sup>94</sup> See Petitioners' Brief at \*20-32 (cited in note 93).

<sup>95</sup> See Respondents' Brief at \*14-42 (cited in note 93).

<sup>96</sup> *AT&T Corp*, 525 US at 378 n 6.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> 427 F3d 34 (1st Cir 2005).

<sup>100</sup> *Id.* at 35.

<sup>101</sup> *Id.* at 36-37.



monopolists.<sup>102</sup> The court noted that although Congress limited the states' abilities to act inconsistently with federal policy,<sup>103</sup> the Act otherwise preserved the states' abilities to enforce and administer their own laws.<sup>104</sup> In addition, the court found that Congress both gave the federal government "an extensive oversight role" and vested the FCC with the authority to craft a federal regulatory regime that the states are required to follow.<sup>105</sup> Accordingly, the court concluded that "general implementation of default common law issue preclusion rules" would "threaten" both the authority preserved for the individual states and "the authority allocated to the FCC" under the Act.<sup>106</sup>

In addition to its concerns about contravening Congress's intent, the First Circuit noted that "[a] judicially imposed rule of preclusion here would also set up an opportunity for regulatory arbitrage contrary to the purposes of the [Act]."<sup>107</sup> Carriers often use interstate interconnection agreements that contain identical terms.<sup>108</sup> If preclusion applied, then the first state agency (or court) to interpret those terms would bind all other states.<sup>109</sup> This would incentivize carriers to "race" to have terms interpreted as favorably as possible and would pressure state agencies to decide these issues quickly in order to preserve their own autonomy.<sup>110</sup> Such results would "cut directly against Congress's desire, as evinced by the text and structure of the [Act]," to preserve individual state autonomy over certain intrastate issues.<sup>111</sup> Based on this understanding of the Act, the First Circuit held that common-law issue preclusion did not apply.<sup>112</sup> The court, however, limited its holding to the specific circumstances of the case at hand and did not address whether the Act completely displaces all federal common law preclusion.<sup>113</sup>

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<sup>102</sup> Id at 36.

<sup>103</sup> *Global NAPs*, 427 F3d at 46–47.

<sup>104</sup> Id (noting that the "intended effect" of the Act was to "leav[e] state commissions free, where warranted, to reflect the policy choices made by their states").

<sup>105</sup> Id at 47.

<sup>106</sup> Id.

<sup>107</sup> *Global NAPs*, 427 F3d at 48.

<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> Id.

<sup>111</sup> *Global NAPs*, 427 F3d at 48.

<sup>112</sup> Id at 45, 49.

<sup>113</sup> Id at 48–49.

Similarly, in *Iowa Network Services, Inc v Qwest Corp*,<sup>114</sup> the Eighth Circuit considered whether an adjudication by the Iowa Utilities Board about a traffic-classification decision barred federal review.<sup>115</sup> Examining the Act, the court found that Congress “ha[d] inserted both the Federal Communications Commission [ ] and the federal courts into the previously state-regulated monopoly.”<sup>116</sup> Furthermore, “Congress was well aware” of the previous split of telecommunications services between the states and the federal government and had “specifically delegated to federal district courts” the authority to review state agency decisions related to interconnection agreements under 47 USC § 252(e)(6).<sup>117</sup> Even though the issue before the court did not implicate § 252(e)(6), the court found that the agency’s decision was still reviewable by a federal court because preclusion would contradict Congress’s intent that issues related to §§ 251–52 be resolved in federal court.<sup>118</sup> After examining the Act, the Eighth Circuit was “convince[d]” that “Congress intended to supplant the common law principles of claim preclusion when it enacted the 1996 Act”<sup>119</sup> and concluded that “[f]ederal courts have the ultimate power to interpret provisions of the 1996 Act.”<sup>120</sup> Thus, the court held that federal common law preclusion did not apply to state agency adjudications of the Act.<sup>121</sup>

The Ninth Circuit, in contrast, has noted in dicta that federal common law preclusion does apply to state agency adjudications of the Act. In *Communications Telesystems International v California Public Utility Commission*,<sup>122</sup> the plaintiff argued that sanctions imposed by the California Public Utilities Commission violated the Act.<sup>123</sup> After adjudication by the state commission,

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<sup>114</sup> 363 F3d 683 (8th Cir 2004).

<sup>115</sup> Id at 688–89.

<sup>116</sup> Id at 691, quoting *Illinois Bell Telephone Co v Worldcom Technologies, Inc*, 179 F3d 566, 568 (7th Cir 1999).

<sup>117</sup> *Iowa Network Services*, 363 F3d at 691, citing 47 USC § 252(e)(6).

<sup>118</sup> *Iowa Network Services*, 363 F3d at 691–94 (recognizing that “[t]o hold that the district court was bound by the [state agency’s] determinations in this case, but allow the district court in the companion case to reach the federal issues, could result in an inconsistency we cannot condone”).

<sup>119</sup> Id at 690.

<sup>120</sup> Id at 692.

<sup>121</sup> Id at 693. The Eighth Circuit recently confirmed its stance on this issue. See *Sprint Communications*, 798 F3d at 708 (“In light of our holding in *Iowa Network Services*, we conclude that Congress did not intend that issue-preclusion principles bar federal-court review of the issue involved here.”).

<sup>122</sup> 196 F3d 1011 (9th Cir 1999).

<sup>123</sup> Id at 1015.

the plaintiff appealed to the California Supreme Court, which declined review.<sup>124</sup> As a result, the only res judicata issue in *Communications Telesystems* was whether the California Supreme Court's refusal to hear the appeal constituted a final judgment on the merits.<sup>125</sup> In passing, however, the Ninth Circuit noted that state agency adjudications are entitled to preclusive effect in federal courts<sup>126</sup>—suggesting that res judicata would still apply even if the state agency decision had not been reviewed by a state court. A variety of district courts have also held that state agency decisions are res judicata without examining congressional intent.<sup>127</sup> However, the issue of whether Congress intended state agencies to bind federal courts was not directly before any of these courts.

Altogether, federal courts have diverged over whether state agency adjudications preclude federal review. The First and Eighth Circuits have both directly held that federal common law does not accord preclusive effect to state agency decisions on the specific issues that have been presented to them. Conversely, the Ninth Circuit and multiple district courts have either noted in dicta or directly held that federal common law preclusion does apply. As a result, whether federal common law preclusion applies to state agency interpretations of the Act is a pressing issue that remains unresolved.

#### B. State Court Judgments, § 1738, and the Unexamined Issue of Implicit Repeal

Federal common law, however, is not the end of the debate on whether state adjudications bar federal review of claims

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1017–19.

<sup>126</sup> *Communications Telesystems*, 196 F3d at 1018, citing *Elliott*, 478 US at 799 (asserting that “quasi-judicial state administrative proceedings” should be granted the same preclusive effect in federal courts as is granted to state court judgments).

<sup>127</sup> See, for example, *Ohio Bell Telephone Co v Public Utilities Commission of Ohio*, 844 F Supp 2d 873, 880–85 (SD Ohio 2012) (“[T]he Court finds that AT & T’s challenge to [the Public Utilities Commission of Ohio’s] determination that Intrado provides ‘telephone exchange service’ for the purpose of compelling interconnection pursuant to Section 251(c)(2) . . . is barred by the doctrine of issue preclusion.”); *McLeodUSA Telecommunications Services, Inc v Arizona Corp Commission*, 655 F Supp 2d 1003, 1017–18 (D Ariz 2009) (“The court can perceive no reason why the Commission’s decision as to the issue of the rates for DC power plant made in the Cost Docket should not be given preclusive effect.”); *Verizon Maryland*, 232 F Supp 2d at 548–50 (noting that a state agency’s interpretation of the Act would be res judicata but for the fact that the state agency had waived its res judicata defense).

involving the 1996 Act. Section 1738 mandates that state court proceedings have the same preclusive effect in federal court as they would have in state court.<sup>128</sup> For res judicata to not apply to a state court decision, § 1738 must be either explicitly or implicitly repealed by a subsequent statute.<sup>129</sup> Implicit repeals are disfavored, such that there must be “irreconcilable conflict” between § 1738 and the subsequent statute.<sup>130</sup> Accordingly, “[r]epeal is to be regarded as implied only if necessary to make the [later enacted law] work.”<sup>131</sup> In other words, “Congress must ‘clearly manifest’ its intent to depart from § 1738.”<sup>132</sup> As a result, implicit repeal of § 1738 is similar to the overcoming of federal common law preclusion; the analysis for both hinges on congressional intent. The difference, however, is that implicit repeal of § 1738 requires Congress’s intent to be “clearly manifest,”<sup>133</sup> a standard that is rarely met.<sup>134</sup> Under this heightened standard, the Supreme Court has held that § 1983, Title VII, and the Securities Exchange Act of 1934<sup>135</sup> each did not repeal § 1738.<sup>136</sup>

The only instance when the Supreme Court has found implicit repeal of § 1738 was in *Brown v Felsen*,<sup>137</sup> which concerned the 1970 amendments to the Bankruptcy Act<sup>138</sup> (“1970 Amendments”).<sup>139</sup> The 1970 Amendments “require[d] creditors to apply

<sup>128</sup> 28 USC § 1738.

<sup>129</sup> *Kremer v Chemical Construction Corp.*, 456 US 461, 468 (1982), citing *Allen*, 449 US at 99 (“[A]n exception to § 1738 will not be recognized unless a later statute contains an express or implied partial repeal.”).

<sup>130</sup> *Kremer*, 456 US at 468, quoting *Radzanower v Touche Ross & Co.*, 426 US 148, 154 (1976).

<sup>131</sup> *Radzanower*, 426 US at 155, quoting *Silver v New York Stock Exchange*, 373 US 341, 357 (1963) (brackets in original).

<sup>132</sup> *Kremer*, 456 US at 477. See also *San Remo Hotel, LP v City and County of San Francisco, California*, 545 US 323, 345 (2005).

<sup>133</sup> *San Remo*, 545 US at 345.

<sup>134</sup> See *Branch v Smith*, 538 US 254, 293 (2003) (O’Connor concurring in part and dissenting in part) (observing that the Court had not found implicit repeal since 1975).

<sup>135</sup> 48 Stat 881, codified as amended at 15 USC § 78a et seq.

<sup>136</sup> See *Allen*, 449 US at 104–05 (holding that § 1983 is subject to issue preclusion under § 1738); *Migra v Warren City School District Board of Education*, 465 US 75, 83–84 (1984) (holding that claim preclusion in addition to issue preclusion occurs under § 1983); *Kremer*, 456 US at 476–78 (applying res judicata to Title VII claims); *Matsushita Electric Industrial Co v Epstein*, 516 US 367, 381–86 (1996) (holding that a state court’s approval of a class action settlement under the Securities Exchange Act barred future federal claims brought under the same statute).

<sup>137</sup> 442 US 127 (1979).

<sup>138</sup> Pub L No 91-466, 84 Stat 990.

<sup>139</sup> *Brown*, 442 US at 135–36. Note that the Court did not explicitly mention § 1738 in *Brown*, but it later acknowledged that *Brown* functionally held that § 1738 was implicitly repealed. See *Matsushita*, 516 US at 380–81. Even though *Brown* did not discuss

to the [federal] bankruptcy court for adjudication of certain dischargeability questions.”<sup>140</sup> At issue in *Brown* was whether a state court’s judgment deciding underlying factual issues was binding on the federal bankruptcy court.<sup>141</sup> During the state court proceeding, the creditor and debtor had stipulated that the debtor owed the creditor, without specifying the basis for liability.<sup>142</sup> Now in federal bankruptcy court, the debtor asserted that his debt was dischargeable because his debt was based on fraudulent misrepresentations by the creditor.<sup>143</sup> The creditor countered that the state court’s judgment was *res judicata* and bound the federal bankruptcy court.<sup>144</sup> Despite the fact that the 1970 Amendments did not explicitly address *res judicata*, the Court held that *res judicata* did not apply.<sup>145</sup> The Court found that allowing state courts to decide the issue would frustrate Congress’s intent to have such dischargeability issues resolved in bankruptcy courts, because the 1970 Amendments were meant to both protect debtors and put these issues in the hands of bankruptcy courts with greater expertise.<sup>146</sup>

Given the rarity of an implied repeal of § 1738, it is unsurprising that a variety of courts have applied § 1738 to state court decisions that interpreted the 1996 Act. However, these courts have neither dealt with challenges that the Act implicitly repeals § 1738 nor addressed whether Congress intended state court judgments to preclude federal review. The Ninth Circuit is the only federal court of appeals to discuss whether § 1738 applies to the 1996 Act. However, the only issue presented to the Ninth Circuit in *Communications Telesystems* was, as noted above, whether the California Supreme Court’s summary denial

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§ 1738 or its implicit repeal, the Court has recognized that its analysis is appropriate for both. See *Marrese v American Academy of Orthopaedic Surgeons*, 470 US 373, 386 (1985) (citing *Brown* to demonstrate that congressional intent is “the primary consideration” in determining whether § 1738 is implicitly repealed). Scholars have also treated *Brown*’s holding this way. See, for example, Jon T. Alexander, *Issue Preclusion, Full Faith and Credit, and Default Judgments: A Dilemma for the Bankruptcy Courts*, 44 UCLA L Rev 159, 186–87 (1996) (asserting that “*Brown* can now be properly viewed as based on an implied statutory exception in the 1970 bankruptcy amendments to the operation of § 1738, at least with regard to state law that would mandate claim preclusion”) (citation omitted).

<sup>140</sup> *Brown*, 442 US at 129–30.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 128–29.

<sup>143</sup> *Id.* at 129.

<sup>144</sup> *Brown*, 442 US at 129.

<sup>145</sup> *Id.* at 135–37.

<sup>146</sup> *Id.* at 135–36.

was a final judgment on the merits.<sup>147</sup> The Ninth Circuit did not discuss either whether the Act implicitly repealed § 1738 or Congress's intent. As a result, the court flatly applied § 1738 and denied federal review of the issue.<sup>148</sup> District courts addressing the issue have so far all held that § 1738 bars federal review, but they have done so without evaluating whether the Act implicitly repeals § 1738.<sup>149</sup>

More recently, the Eighth Circuit had the opportunity to consider the application of § 1738 to the 1996 Act in *Sprint Communications Co v Jacobs*.<sup>150</sup> In that case, the Iowa Utilities Board decided that voice-over-Internet-protocol calls were telecommunications services and that Sprint was therefore required to pay other carriers for the traffic it received.<sup>151</sup> The district court dismissed Sprint's claims related to the Act because a state court had already heard the claims.<sup>152</sup> The Eighth Circuit reversed and allowed Sprint to bring its claims in federal court.<sup>153</sup> The Eighth Circuit, however, sidestepped the issue of § 1738. Because the parties had not argued that there was any difference between common-law preclusion and § 1738, the court assumed the two were identical (even though implicit repeal uses a heightened standard).<sup>154</sup> Because the Eighth Circuit's precedent in *Iowa Network Services* dictated that federal common law preclusion did not apply, the court found that § 1738 also did not apply.<sup>155</sup>

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<sup>147</sup> *Communications Telesystems*, 196 F3d at 1017–19.

<sup>148</sup> *Id.* at 1018 (“Section 1738 thus requires this court to accord the denial [of the writ of review by the California Supreme Court] the same res judicata effect.”).

<sup>149</sup> See, for example, *Coastal Communications Service, Inc v City of New York*, 658 F Supp 2d 425, 439 (EDNY 2009); *New Phone Co v New York City Department of Information Technology and Telecommunications*, 2006 WL 6908254, \*17, 22 (EDNY); *Verizon Maryland*, 232 F Supp 2d at 549–50; *Industrial Communications and Electronics, Inc v Monroe County*, 2002 WL 34412977, \*1–2 (SD Fla.).

<sup>150</sup> 798 F3d 705 (8th Cir 2015).

<sup>151</sup> *Id.* at 706.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 708–09.

<sup>154</sup> *Sprint Communications*, 798 F3d at 707:

Federal courts must accord state-court decisions “full faith and credit” under 28 U.S.C. § 1738, whereas the common law governs the preclusive effect of administrative decisions. None of the defendants argued in their briefs that this distinction mattered, however. . . . We will thus assume—without deciding—that the *Iowa Network Services* framework applies here.

(citation omitted).

<sup>155</sup> *Id.* at 708.

In sum, aside from the Eighth Circuit's avoidance of the issue in *Sprint Communications*, courts have applied § 1738 to state court judgments interpreting the 1996 Act. However, no court has been squarely presented with the issue of whether the Act implicitly repeals § 1738. Resolution of this issue is important because it can reshape both how the Act is interpreted and how it is applied, as well as help achieve the Act's policy goals.

### III. CONGRESS'S INTENT AND RES JUDICATA

To understand Congress's intent, both the plain language of the Act itself as well as the Act's broader structure and purpose must be examined. The plain language alone does not speak to the issue of state adjudications binding federal courts. Contextual analysis—specifically, examination of the Act's goal of maintaining a uniform federal policy along with both its explicit restriction and preservation of state authority—reveals that the application of res judicata to state agency adjudications would undermine the goals of the Act and conflict with its explicit provisions. Altogether, the Act's purpose and structure demonstrate that Congress did not intend for federal courts to be bound by state agencies and that federal common law preclusion should not apply.

This analysis of the Act forms the basis for determining whether § 1738 is implicitly repealed. Comparing state agency adjudications and state court judgments reveals that the two are identical in terms of their ultimate effect on the Act's goals and function. Furthermore, application of res judicata to state court decisions would create an irreconcilable conflict with the Act, because federal review is necessary for the Act to achieve Congress's goals. In sum, this demonstrates that res judicata should not apply, for the same reasons that federal common law preclusion should not apply. Binding federal courts to state court decisions would undermine the Act's purpose, allow for states to exceed the power left to them under the Act, and void the Act's explicit preservation of autonomy for the individual states. In addition, comparison of the Act to the other statutes alleged to have implicitly repealed § 1738 reveals that the Act is most analogous to the only other statute found to have actually done so—the 1970 Amendments in *Brown*. Thus, although partial implied repeals are exceedingly rare, there is strong evidence that the Act implicitly repeals § 1738 and that federal courts are not bound by state court decisions involving the Act.

### A. Federal Common Law Preclusion Should Not Apply to State Agency Adjudications of the 1996 Act

As discussed in Part II.A, whether state agency adjudications are *res judicata* in federal court hinges on whether preclusion is consistent with Congress's intent in passing the 1996 Act.<sup>156</sup> To determine Congress's intent, two primary factors must be evaluated: (1) the plain language of the statute and (2) the broader structure and purpose of the Act.<sup>157</sup>

The plain language of the Act does not expressly provide for federal review of state agency adjudications involving the Act. The Act does, however, explicitly restrict state agencies' authority so that they may act only in accordance with federal policy.<sup>158</sup> The absence of any discussion of state adjudications may itself indicate that Congress intended *res judicata* to apply. However, the full context of the statute must also be examined before any conclusions may be drawn.<sup>159</sup>

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<sup>156</sup> See *University of Tennessee v. Elliott*, 478 US 788, 794–96 (1986) (asserting that the question of preclusion depends on Congress's intent).

<sup>157</sup> See *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (noting that when interpreting statutes, the Court looks at the context in which the statute was adopted and at the "overall statutory scheme"); *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 US 439, 454–55 (1993) ("Statutory construction 'is a holistic endeavor' and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter.") (citation omitted). See also, for example, *Global NAPs*, 427 F.3d at 46–48 (examining the text of the Act, its purpose, and its structure to determine Congress's intent); *Iowa Network Services*, 363 F.3d at 690–94 (determining Congress's intent based on the text of the Act and its purpose). While this is the traditional method of statutory interpretation engaged in by the courts, it is worthwhile to note that this method is controversial among scholars. See, for example, Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 Georgetown L.J. 1863, 1884–99 (2008) (describing the controversy surrounding statutory interpretation methods, and proposing a way to resolve issues and inconsistencies arising from the use of conflicting interpretive methods).

<sup>158</sup> See, for example, 47 USC § 254(f):

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. . . . A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

<sup>159</sup> See *King*, 135 S. Ct. at 2489 ("So when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme. Our duty, after all, is to construe statutes, not isolated provisions.") (quotation marks and citation omitted). See also *Brown*, 442 US at 135–38 (examining the purpose of the 1970 Amendments to determine whether Congress intended *res judicata* to apply, even though the 1970 Amendments were silent on the issue).



Analysis of the structure and purpose of the Act demonstrates that allowing state agencies to have final, binding interpretations of the Act would conflict with Congress's intent. First, the Act's goals of creating a competitive market and expanding telecommunications service require regulatory uniformity. Applying res judicata would undermine federal oversight and fracture this essential uniformity, preventing the Act from serving its purpose. Second, the Act restricts and limits state authority. Res judicata would threaten these explicit provisions of the Act by allowing states to define the bounds of these limits without review. Finally, the Act explicitly preserves each state's authority over certain issues. The application of federal common law preclusion would enable one state agency's adjudication to bind every other state on certain issues—contravening the congressional intent manifested in the Act. Taken together, the Act's structure and purpose reveal that Congress did not intend for state agency adjudications to bind federal courts.

1. The plain language of the Act is silent on federal review of state adjudications of the Act.

The Act itself does not address whether state agency adjudications of the Act may be reviewed, but it does speak to the general allocation of authority between the states and the federal government. As previously discussed in Part I.B, the many parts of the Act place explicit limitations on states that require them to act in accordance with federal policy.<sup>160</sup> The Act explicitly discusses federal review only in § 252(e)(6), which provides that a party may challenge an interconnection agreement “in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of [the Act].”<sup>161</sup> Aside from this, the Act's text does not address federal review of state adjudications.

The lack of any discussion of this important issue in the Act may suggest that Congress intended res judicata to apply. After all, Congress does not “hide elephants in mouseholes”<sup>162</sup> and is assumed to legislate against a backdrop of common-law principles, including res judicata.<sup>163</sup> The Supreme Court, however, has treated the absence of statutory language on federal review to be

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<sup>160</sup> See, for example, 47 USC §§ 251(d)(3), 252(e)(3), 253(a)–(b), 254(f).

<sup>161</sup> 47 USC § 252(e)(6).

<sup>162</sup> *Whitman v American Trucking Associations, Inc.*, 531 US 457, 468 (2001).

<sup>163</sup> See *Astoria Federal Savings & Loan Association v Solimino*, 501 US 104, 108 (1991).

unimportant in previous decisions. For example, in *Verizon Maryland Inc v Public Service Commission of Maryland*,<sup>164</sup> the Supreme Court interpreted the Act to grant federal courts general subject matter jurisdiction—despite the fact that § 252(e)(6) mentions federal review only in regard to interconnection agreements.<sup>165</sup> In addition, the Court found that “none of the other provisions of the Act evince any intent to preclude federal review of a [state] commission determination.”<sup>166</sup> Granted, in *Verizon Maryland* there was a presumption that federal courts had subject matter jurisdiction, while in this context there is a presumption that res judicata applies. Nevertheless, the Supreme Court and lower courts so far have all construed § 252(e)(6) very broadly to allow for federal review,<sup>167</sup> which suggests that the Act’s silence on the issue should not be decisive.<sup>168</sup>

Overall, the Act’s silence on res judicata and federal review is insufficient on its own to resolve whether Congress intended state adjudications to bar federal review. All that can be said based on the Act’s plain text is that Congress did not address the issue. Alone, this would be enough for the basic presumption of res judicata to apply. To conclusively decide the issue, however, the Act’s structure and purpose must also be examined to fully tease out what Congress intended the Act to accomplish, as well as how it was meant to work.<sup>169</sup>

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<sup>164</sup> 535 US 635 (2002).

<sup>165</sup> Id at 643.

<sup>166</sup> Id at 644.

<sup>167</sup> See *Iowa Network Services*, 363 F3d at 692–93 (holding that § 252(e)(6) allows for federal review of state agency determinations unrelated to interconnection agreements); *GTE North, Inc v Strand*, 209 F3d 909, 915–19 (6th Cir 2000) (holding that § 252(e)(6) does not limit federal review to only final interconnection agreements); *Southwestern Bell Telephone Co v Connect Communications Corp*, 225 F3d 942, 945–48 (8th Cir 2000) (interpreting § 252(e)(6) to allow for review of more than just whether an agreement meets the standards of §§ 251–52, despite the plain text of § 252(e)(6)); *MCI Telecommunications Corp v Illinois Bell Telephone Co*, 222 F3d 323, 337–38 (7th Cir 2000) (holding that § 252(e)(6) allows federal courts to review more than a state’s approval or rejection of interconnection agreements); *Southwestern Bell Telephone Co v Brooks Fiber Communications of Oklahoma, Inc*, 235 F3d 493, 497 (10th Cir 2000) (interpreting § 252(e)(6) broadly to allow federal courts to review subsequent interpretations of interconnection agreements after their approval).

<sup>168</sup> See *Iowa Network Services*, 363 F3d at 690–94 (examining the structure and purpose of the Act to determine whether the presumption of res judicata applies, even though the Act’s text is silent on the issue). See also *Brown*, 442 US at 135–36, 138 (analyzing Congress’s intent in the 1970 Amendments to determine whether res judicata applied to state court judgments on certain issues when the 1970 Amendments did not address res judicata).

<sup>169</sup> See *Food and Drug Administration v Brown & Williamson Tobacco Corp*, 529 US 120, 133 (2000) (“It is a fundamental canon of statutory construction that the words of a

2. The Act's structure and purpose indicate that Congress did not intend for state agency adjudications to bind federal courts.

While the Act's plain text may not speak to whether there should be federal review of state agency adjudications regarding the Act, its structure and purpose indicate that there should be.<sup>170</sup> If state agency interpretations of the Act became binding on federal courts, this would lead to a variety of results that Congress plainly did not intend when it passed the Act.<sup>171</sup> Specifically, *res judicata* would undermine the goals and effectiveness of the Act, contravene the Act's explicit restrictions on state authority, and threaten the limited authority preserved for the individual states. Because these results would conflict with Congress's intent, federal common law should not bar federal review of state agency adjudications concerning the Act.<sup>172</sup>

a) *Federal common law preclusion would undermine the uniform national policies necessary to accomplish the Act's goals.* Federal review of state agency interpretations is necessary to maintain the uniform federal policy implemented by the Act, and it is thus critical to the Act's success.<sup>173</sup> Regulatory parity across

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statute must be read in their context and with a view to their place in the overall statutory scheme.”) (quotation marks omitted). See also *Foley Bros, Inc v Filardo*, 336 US 281, 285–90 (1949) (considering a statute's structure, purpose, legislative history, and administrative interpretations because the statute was silent on an issue).

<sup>170</sup> See, for example, *King*, 135 S Ct at 2489–96 (relying on the purpose and structure of the Patient Protection and Affordable Care Act to interpret its provisions because the plain text was ambiguous).

<sup>171</sup> See, for example, *id* at 2492–93 (rejecting an interpretation of the Patient Protection and Affordable Care Act that would “likely create the very ‘death spirals’ that Congress designed the Act to avoid”). See also, for example, *United States Telecom Association v Federal Communications Commission*, 359 F3d 554, 565–66 (DC Cir 2004) (stating that a federal agency may not delegate authority to state commissions, because doing so would work against the general aims of the authorizing statute).

<sup>172</sup> For an analogous situation in which circuit courts have declined to apply common-law preclusion based on strong federal interests in uniform regulation, see *Arapahoe County Public Airport Authority v Federal Aviation Administration*, 242 F3d 1213, 1220–21 (10th Cir 2001) (declining to apply federal common law preclusion because it would result in “state courts trumping the federal interests” and “would further lead to inconsistent enforcement . . . potentially jeopardizing the efficiency and equality” in the national air transportation system); *American Airlines, Inc v Department of Transportation*, 202 F3d 788, 800–01 (5th Cir 2000) (holding that federal common law preclusion did not apply because “federal concerns [were] preeminent” and preclusion would “lead to inconsistent results”).

<sup>173</sup> See Robinson and Nachbar, *Communications Regulation* at 556 (cited in note 16) (noting that, to achieve the Act's goals, “it was considered necessary to develop a comprehensive federal scheme that in significant degree preempted state regulatory discretion to the extent it might impede the overall congressional policy”).

states is necessary to both promote investment and “prevent[ ] burdensome and unnecessary state regulatory practices.”<sup>174</sup> Inconsistent regulation results in a loss of product diversity, lower investment, and increased costs.<sup>175</sup> By forcing carriers and businesses to work with fifty separate state regulators, uneven state-by-state regulation creates an uncertain and unstable marketplace that further discourages investment.<sup>176</sup> It is also likely that state agencies, left without federal oversight, will implement anticompetitive policies simply because they lack the appropriate national perspective and ability to address externalities and, as a result, are “doomed to reach incomplete and often inconsistent conclusions based on their own parochial interests.”<sup>177</sup> Furthermore, even small deviations from federal policy can accumulate over time and cause real economic harm.<sup>178</sup> This is why Congress intended the Act to create a national telecommunications policy featuring significant federal oversight and federal court involvement.<sup>179</sup>

To understand the importance of consistent regulation, consider a specific example. The FCC has recognized that inter-carrier compensation leads to “inefficiencies and opportunities for wasteful arbitrage.”<sup>180</sup> Allowing states to determine how much and when carriers must pay through state agency decisions shatters this uniformity and leads to greater arbitrage between

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<sup>174</sup> Cooper and Koukoutchos, 6 J Telecomm & High Tech L at 342–43 (cited in note 63), citing *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rec 1411, 1421 (1994).

<sup>175</sup> See Cooper and Koukoutchos, 6 J Telecomm & High Tech L at 352 (cited in note 63) (outlining problems with state-by-state regulation).

<sup>176</sup> *Id.* at 352–53.

<sup>177</sup> *Id.* at 352–54. See also *United States Telecom Association*, 359 F3d at 565–66 (invalidating the FCC’s delegation of authority to the states to regulate under § 251, because the states lacked the necessary “national vision and perspective”).

<sup>178</sup> Cooper and Koukoutchos, 6 J Telecomm & High Tech L at 359 (cited in note 63).

<sup>179</sup> See *The Telecommunications Competition and Deregulation Act*, 104th Cong., 1st Sess., in 141 Cong Rec 7882 (June 7, 1995) (statement of Senator Pressler); HR Rep No 104-204(I) at 94 (cited in note 66):

The Committee finds that current State and local requirements . . . have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of [advanced services]. . . . The Committee believes it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible.

See also *United States Telecom Association*, 359 F3d at 565–66 (striking down an FCC delegation of authority to state commissions because it violated Congress’s intent and threatened to undermine regulatory uniformity).

<sup>180</sup> *In the Matter of Connect America Fund*, 26 FCC Rec 17663, 17669 ¶ 9 (2011).

states and carriers, undermining federal reform.<sup>181</sup> At the same time, this also creates inefficient distortions by increasing carriers' costs, which are then passed on to consumers and frustrate Congress's goal of universal service.<sup>182</sup> If states were allowed to interpret when carriers must pay each other without federal review—for example, as the district courts held in *Sprint Communications Co v Bernsten*<sup>183</sup> and *Ohio Bell Telephone Co v Public Utilities Commission of Ohio*<sup>184</sup>—it would undermine the uniform federal intercarrier-compensation regime installed by the Act.

Moreover, as the FCC has noted, the Act's goals to promote competition, reform intercarrier compensation, and revise universal service are all “integrally related.”<sup>185</sup> If the Act fails to achieve one of its goals, then it cannot fully accomplish its other objectives.<sup>186</sup> If states are able to individually interpret the Act, such a system seems destined to result in the same uneven implementation and administration that the Act was meant to fix.<sup>187</sup> This is why Congress explicitly limited the authority of the states so that they can act only in accordance with federal policy,<sup>188</sup> and it is why state regulation “must be carefully policed . . . by federal courts.”<sup>189</sup> Accordingly, Congress did not intend that federal common law should prevent federal courts from resolving issues related to the Act.

This interpretation is consistent with the courts' construction of the Act. The courts have interpreted the Act as having

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<sup>181</sup> See *Global NAPs*, 427 F3d at 47–48 (holding that the application of issue preclusion could “threaten the authority allocated to the FCC” and “set up an opportunity for regulatory arbitrage contrary to the purposes of the [Act]”).

<sup>182</sup> See S Rep No 104-23 at 5 (cited in note 32) (describing the Act's goal “to achieve greater consistency between Federal and State actions to protect universal service”).

<sup>183</sup> Order, Civil Action No 11-183, \*7, 12 (SD Iowa filed Aug 5, 2014).

<sup>184</sup> 844 F Supp 2d 873, 880–84 (SD Ohio 2012).

<sup>185</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rec 15499, 15505–07 ¶¶ 3–7 (1996) (acknowledging the “trilogy” of reforms implemented by the Act and explaining how each is necessary to accomplish the Act's goals).

<sup>186</sup> See id at 15507–08 ¶¶ 4, 9 (“Only when all parts of the trilogy are complete will the task of adjusting the regulatory framework to fully competitive markets be finished.”).

<sup>187</sup> See id at 15527–32 ¶¶ 54–62 (finding that implementing uniform national rules for certain issues was consistent with Congress's intent and the goals of the Act).

<sup>188</sup> See, for example, 47 USC §§ 251(d)(3), 252(e)(3), 253(a)–(b), 254(f). See also Cooper and Koukoutchos, 6 J Telecomm & High Tech L at 346 (cited in note 63) (“Congress federalized this area of the law for the same reasons it federalized regulation of the wireless industry: because it was inherently a national network industry, and because the states were imposing rate regulation that was unwise and counterproductive.”).

<sup>189</sup> Cooper and Koukoutchos, 6 J Telecomm & High Tech L at 359 (cited in note 63).

“offered the states . . . a role as . . . a ‘deputized’ federal regulator. In exchange for this grant of regulatory power, Congress [ ] required the states to agree to submit to federal jurisdiction to review their actions.”<sup>190</sup> Furthermore, the courts have acknowledged that Congress was well aware of the original jurisdictional split that existed prior to the Act—in which states controlled intrastate regulation while the FCC handled interstate regulation—and that Congress granted “[f]ederal courts . . . the ultimate power to interpret provisions of the 1996 Act.”<sup>191</sup> As the Supreme Court held in *AT&T Corp.*, the Act ended the debate about “whether the States will be allowed to do their own thing.”<sup>192</sup> Allowing states to act independently without review threatens to create regulatory inconsistency contrary to Congress’s intent and the Act.<sup>193</sup> Therefore, “if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel.”<sup>194</sup> The courts’ interpretation of the Act thereby supports the idea that Congress did not intend *res judicata* to bar federal courts from reviewing state agency interpretations of the Act, because such a result would directly undermine the effectiveness of the Act.

*b) Applying federal common law preclusion to state agency adjudications would conflict with the Act’s explicit restrictions on state authority.* Throughout the Act, Congress placed explicit limits on state authority so that states cannot act in a manner that contravenes federal telecommunications policy.<sup>195</sup> These

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<sup>190</sup> *MCI Telecommunications*, 222 F3d at 343–44 (“Congress . . . has precluded all other regulation except on its terms. . . . [T]he states are not merely acting in an area regulated by Congress; they are now voluntarily *regulating on behalf of Congress*.”) (emphasis in original). See also *AT&T Communications v. BellSouth Telecommunications Inc.*, 238 F3d 636, 646–47 (5th Cir. 2001) (“Congress established a federal system headed by the FCC to regulate local telecommunications competition. The Act permissibly offers state regulatory agencies a limited mission . . . to apply federal law and regulations as arbitrators and ancillary regulators within the federal system and on behalf of Congress.”).

<sup>191</sup> *Iowa Network Services*, 363 F3d at 692.

<sup>192</sup> *AT&T Corp.*, 525 US at 378 n. 6.

<sup>193</sup> See *United States Telecom Association*, 359 F3d at 565–66 (observing that giving state regulators authority over federal telecommunications policy created the risk that states would “pursue goals inconsistent with those of the [FCC] and the underlying statutory scheme . . . aggravat[ing] the risk of policy drift inherent in any principal-agent relationship”).

<sup>194</sup> *AT&T Corp.*, 525 US at 378 n. 6.

<sup>195</sup> See, for example, 47 USC §§ 251(d)(3), 252(e)(3), 253(a)–(b), 254(f) (detailing the limits on the ability of states in the telecommunications sphere). See also *MCI Telecommunications*, 222 F3d at 343–44; *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rec at 15531–32 ¶ 62 (finding that requiring state conformity with national rules was a “highly desirable”

checks are necessary because elected state agency officials often have divergent incentives to appease voters in their respective states,<sup>196</sup> have a basic desire to preserve and enhance their own authority,<sup>197</sup> and lack the “national vision and perspective” necessary to effectively implement federal telecommunications policy.<sup>198</sup> Allowing states to create unreviewable interpretations of the Act through adjudication would, in practice, remove these explicit restrictions on state authority.

This is best understood by examining the relationship between the deference given to state agency rulemakings and state agency adjudications. State agency rulemakings that interpret federal telecommunications law are reviewed *de novo*, without any deference accorded to the state agency.<sup>199</sup> If state adjudications that interpret federal law are not given preclusive effect, then they are reviewed under the same nondeferential standard.<sup>200</sup> This makes sense because agency interpretations of statutes are accorded deference only if that agency is delegated authority under the statute.<sup>201</sup> Because the Act is a federal law and

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means of achieving “Congress’s goal of a pro-competitive national policy framework”). For a more detailed discussion, see Part I.B.

<sup>196</sup> See Cooper and Koukoutchos, 6 J Telecomm & High Tech L at 355–59 (cited in note 63) (describing how state regulators have resisted and tried to work around federal limitations on their authority); Michael K. Kellogg, John Thorne, and Peter W. Huber, *Federal Telecommunications Law* § 1.10 at 68–69 (Little, Brown 1992) (describing state regulatory commissioners who resisted the move to usage-based pricing).

<sup>197</sup> See William A. Niskanen Jr, *Bureaucracy and Public Economics* 36–42 (Edward Elgar 1994) (describing agencies’ incentives to expand their own power and to be budget maximizers).

<sup>198</sup> *United States Telecom Association*, 359 F3d at 565–66 (striking down the FCC’s delegation of authority to state agencies to make § 251(d)(2) “impairment” determinations, because such delegation risked allowing the states to “pursue goals inconsistent with . . . the underlying statutory scheme [of the Act]”). See also Cooper and Koukoutchos, 6 J Telecomm & High Tech L at 352–55 (cited in note 63) (describing how allowing individual state agencies to regulate telecommunications is “fundamentally incompatible with modern wireline telephony” due to their inability to properly perceive and deal with externalities inherent in telecommunications regulation).

<sup>199</sup> See *Puerto Rico Telephone Co v SprintCom, Inc*, 662 F3d 74, 89 (1st Cir 2011) (“[W]e review *de novo* the Board’s interpretations of federal and state law.”); *WWC License, LLC v Boyle*, 459 F3d 880, 889–90 (8th Cir 2006) (“We owe no deference to the [state] Commission’s interpretations of federal law.”).

<sup>200</sup> See *Iowa Network Services, Inc v Qwest Corp*, 385 F Supp 2d 850, 864 (SD Iowa 2005) (reviewing *de novo* a state agency’s interpretation of federal law in an adjudication).

<sup>201</sup> See *United States v Mead Corp*, 533 US 218, 226–27 (2001) (holding that *Chevron* deference is applicable only if “Congress delegated authority to the agency generally to make rules carrying the force of law, and [if] the agency interpretation claiming deference was promulgated in the exercise of that authority”). Furthermore, state agency interpretations are also likely not entitled to lesser *Skidmore* deference. See Kristin E. Hickman and Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107

is implemented by the FCC, there is no basis for courts to defer to state agency interpretations of it.<sup>202</sup>

The application of *res judicata*, however, flips the standard of review on its head. Instead of being given no deference, interpretations of federal law that occur as part of state agency adjudications become completely unreviewable in federal court. The application of federal common law preclusion would thereby allow states to go from receiving no deference when interpreting the Act to having full and binding authority to do so.<sup>203</sup> This result violates the Act's explicit limitations on state authority by allowing state agencies to interpret those limitations and other components of federal law without review. Altogether, giving state agencies complete deference in their interpretations of federal law has no basis in the law and violates the Act.

Further, if state adjudications were *res judicata*, then FCC rulemaking or adjudication would be the only way that such interpretations—from either state agencies or state courts—could be reviewed or changed. This form of delayed review,<sup>204</sup> however, is inconsistent with Congress's intent to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services."<sup>205</sup> It also remains to be seen whether the FCC has the organizational resources to assume the

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Colum L Rev 1235, 1263 (2007) ("Separately, while *Skidmore*'s attention to agency expertise might suggest that it should apply to state agencies, the Court has never suggested that *Skidmore* extends that far.") (citation omitted).

<sup>202</sup> See *Puerto Rico Telephone Co*, 662 F3d at 89:

[A]lthough it is customary where any doubt exists to give some deference to the agency charged with administering a statute, we give no deference to the Board's interpretation of the 1996 Act because it is the FCC—and not the individual state commissions—that has the authority to administer the 1996 Act.

(citation omitted).

<sup>203</sup> See *GTE North*, 209 F3d at 915 (holding that barring federal review of state actions "would frustrate Congress's intent by allowing state commissions to insulate from federal review decisions allegedly preempted by, or otherwise contrary to, federal telecommunications law").

<sup>204</sup> See J. Brad Bernthal, *Procedural Architecture Matters: Innovation Policy at the Federal Communications Commission*, 1 Tex A&M L Rev 615, 642–45 (2014) (describing why FCC proceedings are structured to favor the status quo and encourage delay, and referencing one rulemaking process that took nearly ten years to complete). From 2010 to 2015, the median time from filing to disposition of a civil case in federal district court varied between 6.8 and 8.8 months. *United States District Courts — National Judicial Caseload Profile* \*1, archived at <http://perma.cc/4E3F-AH3H>. Over the same 6 years, the median time from filing a notice of appeal to disposition of a case in federal circuit court varied between 8.4 and 11.8 months. *U.S. Court of Appeals - Judicial Caseload Profile* \*2, archived at <http://perma.cc/F7YN-4PD9>.

<sup>205</sup> S Rep No 104-230 at 1 (cited in note 36).



task of managing and reviewing state agency adjudications in such detail. This is an issue that the 1996 Act certainly does not address, as it does not provide increased resources, guidance, or personnel for the FCC to oversee the individual states in such minutiae.<sup>206</sup> Finally, even if FCC review were meant to be the only federal review mechanism, the FCC's interpretations would still ultimately be reviewed by the federal courts. After all, FCC actions are ultimately subject to review in federal court—though the FCC receives much greater deference than state agencies.<sup>207</sup> Thus, applying *res judicata* to state agency adjudications would, at the very least, undermine—if not outright void—the explicit restrictions that Congress placed on state authority to regulate telecommunications services.

*c) Applying federal common law preclusion to state agency adjudications would conflict with the Act's explicit preservation of state authority over certain issues.* In addition to allowing the states to upset the Act's limits on state authority, the application of *res judicata* would contravene Congress's intent to preserve the states' authority within their own territories.<sup>208</sup> Within the Act itself, there are numerous carveouts for states to exercise their own authority so long as it is in conformity with the Act.<sup>209</sup> However, if state agency adjudications are given *res judicata* effect, then one state can be bound by *another* state's interpretation of the Act.<sup>210</sup> Such a result voids Congress's explicit retention of states' authority over certain issues.

Preclusion could manifest itself as either claim preclusion or issue preclusion in this context. For example, suppose that Carrier A uses verbatim language in its interconnection agreements in both Kansas and Missouri. Carrier A has a dispute with Carrier B in Kansas over the meaning of some of the language in their interconnection agreement, specifically about what kind of access

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<sup>206</sup> Bernthal, 1 Tex A&M L Rev at 625 (cited in note 204) (observing that the FCC “lacks sufficient resources . . . to perform its core functions”).

<sup>207</sup> See, for example, *City of Arlington, Texas v Federal Communications Commission*, 133 S Ct 1863, 1869–73 (2013) (describing *Chevron* deference and upholding FCC regulations regarding applications for wireless facility sitings that were issued pursuant to the Act).

<sup>208</sup> See 141 Cong Rec at 7886–88 (cited in note 179) (discussing the role envisioned for the states to retain individual authority over issues regarding interconnection, retail services, and universal service, so long as the states' regulations in those areas are consistent with the FCC's regulations).

<sup>209</sup> See Part I.B (discussing how the Act explicitly preserved authority for the states over certain issues).

<sup>210</sup> See *Global NAPs*, 427 F3d at 47–49.

Carrier A must give Carrier B to its network elements in the state. The two parties then decide to adjudicate their dispute in front of the Kansas Corporation Commission. The Kansas Corporation Commission adjudicates the issue and rules in favor of Carrier B. Applying preclusive effect to the Kansas Corporation Commission's decision would have two consequences. First, if Carrier A tried to adjudicate the issue again in Missouri, the Missouri Public Service Commission would be compelled to follow the Kansas Corporation Commission's legal interpretation of the agreement and rule in favor of Carrier B. Second, if the same language from Carrier A's interconnection agreement were also used by Carrier C in Missouri, then the Missouri Public Service Commission would again be bound to the same interpretation used by the Kansas Corporation Commission.

Application of federal common law preclusion to one state agency's adjudication would thereby allow it to bind every other state on a given issue, because the Full Faith and Credit Clause of the US Constitution requires each state to give preclusive effect to other states' administrative adjudications.<sup>211</sup> This conflicts with Congress's intent to allow each individual state to retain some authority over telecommunications regulation—evident from the fact that the Act repeatedly refers to *a* state's authority to enforce its own laws and regulations.<sup>212</sup> The only way to avoid this result is for federal courts to not apply federal common law preclusion.

The First Circuit concluded in *Global NAPs* that federal common law preclusion would conflict with Congress's intent for precisely this reason.<sup>213</sup> In *Global NAPs*, the issue was whether an adjudication by the Rhode Island Public Utilities Commission

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<sup>211</sup> US Const Art IV, § 1 (requiring the states to give "Full Faith and Credit" to the judgments of other states). Courts are unanimous in holding that the Full Faith and Credit Clause requires states to accord other states' administrative fact-findings *res judicata* effect. See *Elliott*, 478 US at 798, citing *Thomas v Washington Gas Light Co*, 448 US 261, 281 (1980) (noting that "the Full Faith and Credit Clause compels the States to give preclusive effect to the factfindings of an administrative tribunal in a sister State"). The circuits are currently split on whether states are bound by other state agencies' conclusions of law. Compare *Miller v County of Santa Cruz*, 39 F3d 1030, 1037–38 (9th Cir 1994) (holding that a state agency's interpretation of law binds other states), with *Edmundson v Borough of Kennett Square*, 4 F3d 186, 193 (3d Cir 1993) (holding that a state agency's interpretation of law did not bind other states).

<sup>212</sup> See, for example, 47 USC §§ 252(e)(3), 253(b), 254(f). See also S Rep No 104-23 at 35 (cited in note 32) (referring to the Act's goal of preserving "a State's authority" to implement consumer-protection regulations if consistent with the Act).

<sup>213</sup> *Global NAPs*, 427 F3d at 47–49.

over an interconnection agreement bound the Massachusetts Department of Telecommunications and Energy when it was interpreting verbatim language in a different agreement.<sup>214</sup> The district court held that federal common law preclusion applied and that Massachusetts was therefore bound by the previous Rhode Island adjudication.<sup>215</sup> The First Circuit reversed because applying *res judicata* to state agency adjudications—and thereby binding one state to follow another state’s decisions—conflicted with the Act’s “intended effect of leaving state commissions free, where warranted, to reflect the policy choices made by their states.”<sup>216</sup> The court also noted that the application of *res judicata* would create perverse incentives, as carriers would be incentivized to rush to obtain decisions from the state agencies that are most favorable to them in order to preclude other states from ruling differently.<sup>217</sup> Such “results cut directly against Congress’s desire, as evinced by the text and structure of the [Act].”<sup>218</sup> When it preserved authority for the states, Congress surely did not intend that one state be able to bind every other state with its decisions<sup>219</sup>—an absurd result that must be avoided when interpreting the Act.<sup>220</sup> Therefore, federal common law preclusion should not apply to state agency adjudications of federal law issues under the Act.

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<sup>214</sup> *Id.* at 35.

<sup>215</sup> *Global NAPs, Inc v Verizon New England Inc*, 332 F Supp 2d 341, 365–70 (D Mass 2004), revd, 427 F3d 34 (1st Cir 2005), citing *Elliott*, 478 US at 798–99 (“Thus, this court holds that all of the decisions of the [Rhode Island Public Utilities Commission]—both factual and legal—are entitled to the same preclusive effect before other agencies and courts that they would receive in the Rhode Island state courts.”).

<sup>216</sup> *Global NAPs*, 427 F3d at 46, citing Peter W. Huber, Michael K. Kellogg, and John Thorne, *Federal Telecommunications Law* §§ 3.3.3 to .4 (Aspen 2d ed 1999).

<sup>217</sup> *Global NAPs*, 427 F3d at 48 (noting that providing preclusive effect “creates the risk of perverse incentives” because “state commissions themselves would be encouraged to decide an issue as quickly as possible, to preserve their independence” and “[c]arriers . . . will race to the state commission with the most amenable views, and perhaps leverage that decision to their advantage”).

<sup>218</sup> *Id.*

<sup>219</sup> It is important to note, however, that in some instances it is federal policy for one state agency’s findings to bind other states in order to achieve uniformity. This is not the operation of *res judicata* but instead of FCC regulations that the Act mandates the states to follow. For example, once one state agency has determined that it is technically possible to unbundle certain network elements, all other states’ agencies are required to presume that this unbundling is possible in their states as well, absent a specific showing by a carrier to rebut this presumption. See *id.* at 48–49, citing 47 CFR §§ 51.230(c), 51.319(b)(3)(iii).

<sup>220</sup> See *Griffin v Oceanic Contractors, Inc*, 458 US 564, 575 (1982) (“[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”).

### 3. An objection: why not exclusive federal jurisdiction?

If *res judicata* does not apply and all state agency adjudications may be retried at the federal level, it may seem strange that Congress allowed states to hear claims involving the 1996 Act at all. If Congress intended not to allow federal courts to have the final say on such issues, it could be argued that Congress would have simply given federal courts exclusive jurisdiction. This would seem to be a logical choice if Congress intended federal courts to be the final arbiters of the Act, because it would prevent forum shopping and relitigation. Furthermore, Congress clearly knew how to do this, because it granted federal courts exclusive jurisdiction in § 252(e)(6) to review state agency determinations relating to interconnection agreements. It makes sense for a variety of reasons, however, for states to retain jurisdiction over federal claims in suits that also involve state telecommunications regulation.

First, the Act made states “deputized” regulators who enforce federal telecommunications law.<sup>221</sup> As enforcers of the federal regime, states necessarily must be able to adjudicate claims that involve basic implementation of the Act—otherwise, their enforcement efforts would be ultimately toothless. In addition, state enforcement actions that apply well-settled or clear federal law will not require federal review, even though it is available. Therefore, state jurisdiction allows states to fulfill their role as deputized regulators of federal policy. Even though federal review would be available for any application of federal law, sophisticated parties likely would not bother to challenge such application in federal court if the state’s application of federal law were clearly correct. This reduces any potential relitigation.

Second, removing state jurisdiction would unnecessarily complicate the enforcement of purely state regulation. Under the Act, states still retain authority to implement their own telecommunications regulations so long as they do not conflict with federal law. Federal courts lack subject matter jurisdiction to

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<sup>221</sup> *MCI Telecommunications*, 222 F3d at 344 (finding that “Congress has offered the states . . . [a] grant of regulatory power [under the Act]” in exchange for “agree[ing] to submit to federal jurisdiction to review their actions”). See also *AT&T Communications*, 238 F3d at 646–47 (“The Act permissibly offers state regulatory agencies a limited mission . . . to apply federal law and regulations as arbitrators and ancillary regulators within the federal system and on behalf of Congress.”).

hear purely state law claims related to such regulation.<sup>222</sup> Further complicating the issue is the fact that litigation of state claims may result in a decision—through an interpretation of either a state law or contract language—that contravenes federal law. In this way, delineating between state and federal law issues in the telecommunications context can be difficult. If Congress were to have stripped states of jurisdiction over federal claims, it would likely interfere with the states’ resolution of purely state issues.

Finally, allowing states to interpret and apply their own laws in adjudications can avoid the need for federal review. State adjudications may interpret state laws in such a way that avoids any need to interpret federal law. In fact, states may seek to construe state laws in light of federal law to deliberately avoid conflict.<sup>223</sup> This allows states to maintain full control over certain areas of regulation as the Act intended. Ultimately, the Act’s retention of state jurisdiction alone is not enough to show that Congress intended for *res judicata* to apply.

#### B. The 1996 Act Implicitly Repeals § 1738

Congress’s intent, evinced by the 1996 Act’s goals and structure, also demonstrates that the Act implicitly repeals § 1738. The conflict between the Act and § 1738 meets the higher “irreconcilable” standard for implicit repeal because repeal is “implied only if necessary to make the [later enacted law] work.”<sup>224</sup> Because *res judicata* frustrates the Act’s goals, as well as the express limitation and preservation of state authority, implicit repeal of § 1738 is necessary for the Act to work. In addition, the philosophy and scheme behind the Act are analogous to the 1970 Amendments to the Bankruptcy Act, which the Supreme Court held in *Brown* to implicitly repeal § 1738.<sup>225</sup> Finally, the policy rationale behind § 1738—and *res judicata* generally—is weak in

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<sup>222</sup> See, for example, *Puerto Rico Telephone Co v Telecommunications Regulatory Board of Puerto Rico*, 189 F3d 1, 19 (1st Cir 1999) (holding that federal courts lack jurisdiction to hear purely state law claims).

<sup>223</sup> See, for example, *In re Bretton Woods Telephone Co*, 56 A3d 1266, 1275 (NH 2012) (striking down a New Hampshire state law that violated the Act, but noting that the New Hampshire Public Utilities Commission could potentially craft regulations that complied with federal law).

<sup>224</sup> *Radzanower v Touche Ross & Co*, 426 US 148, 155 (1976), quoting *Silver v New York Stock Exchange*, 373 US 341, 357 (1963) (brackets in original).

<sup>225</sup> *Brown*, 442 US at 135–36.

the context of the Act and is outweighed by the benefits of federal review.

1. The Act's structure and purpose indicate that Congress did not intend for state courts to bind federal courts.

While the Act's text does not speak to how federal courts should treat state court judgments,<sup>226</sup> careful analysis reveals that the Act's objectives are hindered by the application of res judicata to state court decisions in just the same manner as by the application of res judicata to state agency adjudications. The Act's explicit limitation and preservation of state authority are likewise jeopardized by applying res judicata to state court judgments. Accordingly, it would conflict with Congress's intent to apply § 1738, and the statutory provision is thereby implicitly repealed.

In terms of the impact on federal telecommunications policy and the goals of the Act, a state court judgment is effectively identical to a state agency adjudication. Both are decisions regarding state telecommunications regulations and their interaction with federal law. In fact, most state court decisions that involve telecommunications regulations are simply reviewed agency decisions.<sup>227</sup> Further, some state courts even give deference to state agency interpretations of the Act.<sup>228</sup> The only actual difference between the two is that state agency adjudications can involve a state agency's review of its own actions or policies. A state court decision, meanwhile, implicates review of either a state agency's decision or some other party's action. But both state agency adjudications and state court decisions have the same result: a binding interpretation of federal law. Thus, the source of the action—whether it is a state agency, a state legislative body,

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<sup>226</sup> For analysis of the Act's text, see Part III.A.1.

<sup>227</sup> See, for example, *Sprint Communications*, 798 F3d at 706–07; *Communications Telesystems*, 196 F3d at 1014–15.

<sup>228</sup> Compare *MCI WorldCom Communications, Inc v Department of Telecommunications and Energy*, 810 NE2d 802, 809 (Mass 2004) (holding that the Massachusetts Department of Telecommunications and Energy's interpretation of an interconnection agreement's requirements under § 252(e)(6) was owed "great deference" by state courts), with *Bretton Woods*, 56 A3d at 1273 (reviewing de novo a state agency's interpretation of § 253 of the Act). Deference to state agency interpretations of federal statutes, however, is inappropriate. See *Michigan Bell Telephone Co v Strand*, 305 F3d 580, 586 (6th Cir 2002), quoting *Orthopaedic Hospital v Belshe*, 103 F3d 1491, 1495 (9th Cir 1997) ("[A] state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes under *Chevron*." (quotation marks omitted)).

or some other source—creates a distinction between state agency adjudications and state court judgments that has no difference in terms of the action’s ultimate effect on federal telecommunications policy.<sup>229</sup> Accordingly, a federal court’s review of a state court decision is equivalent to federal review of a state agency adjudication in terms of its impact. Giving a reviewed state agency decision greater preclusive effect would serve no purpose but to make otherwise-reviewable state agency decisions unreviewable, frustrating Congress’s intent.<sup>230</sup>

State court judgments therefore have the same potential to undermine the Act as state agency adjudications have. For example, applying *res judicata* to a state court judgment that determines whether a state agency has the authority to classify a given service as an “information service” or a “telecommunication service” under the Act<sup>231</sup> stands to potentially increase or decrease the state’s authority beyond the Act’s prescribed limits. Furthermore, if such a decision is not in line with federal policy, then it stands to undermine the goals and purpose of the Act by overregulating those services (thus harming competition) and by increasing carriers’ costs (thus undermining universal service and intercarrier-compensation reforms). Similarly, a grant of preclusive effect to such a determination could also be used to bind other states, violating the Act’s explicit preservation of their authority. Thus, for the same reasons discussed in Part III.A.2, granting *res judicata* effect to state court decisions undermines the purpose of the Act and contravenes the Act’s explicit limitations on state authority, as well as its explicit preservation of such authority.

2. The conflict between the Act and § 1738 is irreconcilable and clearly manifests Congress’s intent to implicitly repeal § 1738.

Simply being contrary to Congress’s intent may be sufficient to overcome federal common law preclusion, but § 1738 requires

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<sup>229</sup> See *GTE North*, 209 F3d at 918–19 (describing the “enormous negative implications” of not allowing federal review of state actions).

<sup>230</sup> See *id.* at 915–16 (holding that the denial of federal review would “frustrate Congress’s intent by allowing state commissions to insulate from federal review decisions allegedly preempted by, or otherwise contrary to, federal telecommunications law”).

<sup>231</sup> This was essentially the issue disputed in *Sprint Communications* that had been previously decided by the Iowa Utilities Board and reviewed by a state court. *Sprint Communications*, 798 F3d at 706–07.

that Congress “clearly manifest” its intent.<sup>232</sup> Accordingly, the Act and § 1738 must be irreconcilable<sup>233</sup>—a standard that the Supreme Court has rarely found satisfied.<sup>234</sup> The application of § 1738, however, would create irreconcilable conflict with the explicit provisions of the Act in the manner and ways previously discussed. Application of *res judicata* in one state court necessarily binds other states, shattering the cooperative federalism explicitly laid out in the Act.<sup>235</sup> As a result, implicit repeal of § 1738 is required because otherwise the Act would not “work.”<sup>236</sup>

The Supreme Court’s previous treatment of the Act corroborates this. In *AT&T Corp.*, the Court addressed whether the Act was a “‘clear and manifest’ showing of congressional intent to supplant traditional state police powers” over telecommunications regulation.<sup>237</sup> The Court held that the Act “unquestionably” was.<sup>238</sup> In addition, the Court noted that “a federal program administered by 50 independent state agencies is surpassing strange” and that “if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel.”<sup>239</sup> Since state court decisions may be properly characterized in the context of telecommunications regulation as being functionally the same as state agency adjudications, the Court’s strong language is equally applicable to § 1738. This confirms that § 1738 creates an irreconcilable conflict with the Act and is therefore implicitly repealed.

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<sup>232</sup> *Kremer v Chemical Construction Corp.*, 456 US 461, 477 (1982).

<sup>233</sup> *Id.* at 468, citing *Radzanower*, 426 US at 154.

<sup>234</sup> See *Matsushita Electrical Industrial Co v Epstein*, 516 US 367, 380–81 (1996).

<sup>235</sup> *Global NAPs*, 427 F3d at 47–48 (explaining that “[f]or a court to step in and shift the state-by-state decision-making authority” from one state to another, as the result of giving one state’s adjudications preclusive effect over the other’s, “would upset the allocations of authority made out under the [Act]” and undermine the “scheme of cooperative federalism” embodied in the Act).

<sup>236</sup> *Radzanower*, 426 US at 155, quoting *Silver*, 373 US at 357 (holding that there is implicit repeal when it is “necessary to make the [later enacted law] work”) (brackets in original).

<sup>237</sup> *AT&T Corp.*, 525 US at 378 n 6, quoting *Rice v Santa Fe Elevator Corp.*, 331 US 218, 230 (1947).

<sup>238</sup> *AT&T Corp.*, 525 US at 378 n 6.

<sup>239</sup> *Id.*



3. The Act is analogous to the 1970 Amendments held by the Supreme Court to implicitly repeal § 1738.

Although the Supreme Court has found § 1738 to be implicitly repealed only once, that single instance is more analogous to the 1996 Act than are the instances in which the Court has held otherwise.<sup>240</sup> Specifically, in *Brown*, the Court held that the 1970 Amendments to the Bankruptcy Act implicitly repealed § 1738.<sup>241</sup> Prior to the 1970 Amendments, certain bankruptcy dischargeability issues were typically decided in state courts when judgment-enforcement actions were brought under state law.<sup>242</sup> The 1970 Amendments changed the dischargeability rules and required creditors to apply to federal bankruptcy courts to adjudicate those questions.<sup>243</sup> At issue in the case was whether a state court judgment that had decided facts underlying the dischargeability question was reviewable by the federal bankruptcy court.<sup>244</sup> Although Congress's intent was not explicit in either the 1970 Amendments themselves or the legislative history, the Court held that "it would be inconsistent with the philosophy of the 1970 amendments to adopt a policy of *res judicata*" that allowed state courts "to resolve a federal dischargeability question."<sup>245</sup> In reaching this conclusion, the Court highlighted the fact that the 1970 Amendments gave exclusive jurisdiction to federal bankruptcy courts and that Congress preferred such claims to be resolved by federal courts with greater expertise.<sup>246</sup>

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<sup>240</sup> The previous instances when the Court has found § 1738 not to be implicitly repealed are all distinguishable from the Act because each of those cases involved statutes that created private rights of action or that limited when courts can enter certain injunctions, not statutes that created national regulatory regimes. See *Allen v McCurry*, 449 US 90, 104–05 (1980) (holding that § 1983 does not implicitly repeal § 1738); *Kremer*, 456 US at 476–78 (holding that Title VII does not implicitly repeal § 1738); *Matsushita*, 516 US at 386 (holding that the Securities Exchange Act does not implicitly repeal § 1738); *Parsons Steel, Inc v First Alabama Bank*, 474 US 518, 523–24 (1986) (limiting when courts can enter injunctions under the Anti-Injunction Act).

<sup>241</sup> *Brown*, 442 US at 138–39 (noting that allowing a state court decision to be *res judicata* would take certain federal bankruptcy issues "out of bankruptcy courts well suited to adjudicate them, and force those issues onto state courts concerned with other matters, all for the sake of a repose the bankrupt has long since abandoned").

<sup>242</sup> See *id.* at 129 (stating that "[t]raditionally, the bankruptcy court . . . left [ ] dischargeability . . . to the court in which the creditor sued, after bankruptcy, to enforce his prior judgment").

<sup>243</sup> *Id.* at 129–30 ("In 1970, however, Congress altered [federal bankruptcy law] to require creditors to apply to the bankruptcy court for adjudication of certain dischargeability questions.").

<sup>244</sup> *Id.* at 128–31.

<sup>245</sup> *Brown*, 442 US at 136–37.

<sup>246</sup> *Id.* at 135–37.

Although the Court never explicitly mentioned § 1738, the Court held that the state court judgment was not *res judicata* in federal court.<sup>247</sup> The Court and scholars have since acknowledged that the Court's decision was equivalent to a holding that § 1738 was implicitly repealed.<sup>248</sup>

The philosophy behind the 1996 Act is parallel to that encompassed in the 1970 Amendments at issue in *Brown*. Both embody a shift away from state resolution of certain issues. In the 1970 Amendments, Congress intended there to be a strong federal bankruptcy scheme that resolved certain bankruptcy issues—taking the authority to resolve those issues away from the states. In the 1996 Act, Congress intended there to be a uniform federal telecommunications regime<sup>249</sup>—again, taking authority away from the states.

There is, however, a noticeable difference between the two. The 1970 Amendments dealt much more directly with federal review because bankruptcies by nature involve the judicial system. The 1996 Act, however, goes to great lengths to detail federal primacy over the states when it comes to telecommunications regulation. Necessarily behind this federal regime is judicial enforcement to ensure that the states act in line with federal policy. State courts lack the national perspective—analogueous to their lack of expertise in *Brown*<sup>250</sup>—that is required to properly interpret the 1996 Act, so federal court oversight is essential.<sup>251</sup> Although it may be one step further from the Act itself, the necessity of federal review—and repeal of § 1738—is parallel to the philosophy behind the 1970 Amendments. The Court's holding in *Brown* thereby suggests that the Act implicitly repeals § 1738.

In addition, it is worthwhile to note that the Act is distinguishable from every instance in which the Court has not found implicit repeal. None of the statutes considered by the Court

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<sup>247</sup> *Id.* at 138–39.

<sup>248</sup> See note 139.

<sup>249</sup> See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rec at 15527–28 ¶ 54 (finding that having uniform national rules is “consistent with the terms and the goals of the [Act]”).

<sup>250</sup> *Brown*, 442 US at 136–37.

<sup>251</sup> See *United States Telecom Association*, 359 F3d at 565–66 (striking down an FCC regulation that delegated authority to the states, because of “the risk that [states would] not share the agency’s national vision and perspective”) (quotation marks omitted); Cooper and Koukoutchos, 6 J Telecomm & High Tech L at 352–55, 359 (cited in note 63) (emphasizing the need for federal courts to “carefully police[]” the “remnants of state regulatory authority”).

involved anything like the comprehensive federal regulatory regime set up by the Act. Instead, those statutes created private rights of action for certain claims.<sup>252</sup>

4. The policy rationale behind § 1738—and res judicata generally—is outweighed by federal interests in telecommunications regulation.

Although the implicit repeal of § 1738 is a matter of statutory interpretation, the Supreme Court has repeatedly indicated that it has seldom found implicit repeal because of its “assumption that the weighty interests in finality and comity trump the interest in giving losing litigants access to an additional appellate tribunal.”<sup>253</sup> Finality has a variety of benefits, as it prevents duplicative litigation, encourages reliance on judicial decisions, and unclutters the courts by reducing litigation.<sup>254</sup> Comity embodies respect for states as part of the federal system.<sup>255</sup> But even on this policy level, implicit repeal of § 1738 makes sense in the context of the Act.

The effect of any state court decision in later federal litigation is “strongly influenced” by the federal interests involved.<sup>256</sup> Federal interests are more intense when state courts apply federal substantive law like the Act.<sup>257</sup> At least to some degree, this mitigates the typical rationale for treating the state court judgment as res judicata.<sup>258</sup> Furthermore, relitigation in a federal forum is most appropriate when the “legal frame of reference is an important element.”<sup>259</sup> Such is the case in this context, in which Congress has explicitly removed authority from the states and transferred it to the federal government—a transfer essential to accomplish the goals of the Act.<sup>260</sup>

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<sup>252</sup> Specifically, the Court has rejected that § 1983, Title VII, or the Securities Exchange Act implicitly repeals § 1738. See note 240.

<sup>253</sup> *San Remo Hotel, LP v City and County of San Francisco, California*, 545 US 323, 345 (2005). See also, for example, *Kremer*, 456 US at 478.

<sup>254</sup> See *Brown*, 442 US at 131.

<sup>255</sup> See *Younger v Harris*, 401 US 37, 44 (1971).

<sup>256</sup> Restatement (Second) of Judgments § 86, comment b (1982).

<sup>257</sup> Restatement (Second) of Judgments § 86, comments b, d (1982) (“If the state court action involved application of federal substantive law, the federal concern may be more intense.”).

<sup>258</sup> Restatement (Second) of Judgments § 86, comments b, d (1982).

<sup>259</sup> Restatement (Second) of Judgments § 86, comment d (1982).

<sup>260</sup> See *United States Telecom Association*, 359 F3d at 565–66; Cooper and Koukoutchos, 6 J Telecomm & High Tech L at 352–55 (cited in note 63) (describing states as unfit

Nevertheless, rejection of *res judicata* imposes at least some stress on the system of comity between state and federal courts.<sup>261</sup> The interests of comity, however, are greatly weakened in the context of the Act. As discussed in Part III.A.2.c, application of *res judicata* would enable each individual state to bind all other states on a given issue. In this context, adhering to the principle of comity has the perverse consequence of allowing one state to govern every other state's telecommunications regulation.<sup>262</sup> Refusal to apply *res judicata* to state court judgments thereby gives state courts the ability to act independently of each other on important state issues, as the Act intends. Comity demands that courts in different jurisdictions give each other mutual respect, not that states cede their authority to one another. Furthermore, since states regulate telecommunications services only "on behalf of Congress"<sup>263</sup> as "arbitrators and ancillary regulators within the federal system,"<sup>264</sup> it is predominantly federal interests that are at issue. This is exemplified by the fact that federal courts refuse to invoke *Burford* abstention to issues arising under the Act,<sup>265</sup> which applies when federal review would infringe on a state's interest in managing a local problem.<sup>266</sup> Therefore, any relitigation in federal court does not tread on sensitive state interests, and any damage to comity is minimal.<sup>267</sup>

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telecommunications regulators due to their lack of a national perspective and their basic desire to serve local interests).

<sup>261</sup> Restatement (Second) of Judgments § 86, comment d (1982).

<sup>262</sup> See, for example, *Global NAPs*, 427 F3d at 48 (describing how, if *res judicata* applied, one state's interpretation of an interconnection agreement could bind all other states on the issue).

<sup>263</sup> *MCI Telecommunications*, 222 F3d at 343.

<sup>264</sup> *AT&T Communications*, 238 F3d at 646.

<sup>265</sup> See *Illinois Bell Telephone Co v Global NAPs Illinois, Inc*, 551 F3d 587, 589 (7th Cir 2008); *Cingular Wireless, LLC v Thurston County*, 150 Fed Appx 633, 635–36 (9th Cir 2005).

<sup>266</sup> See *Martin v Stewart*, 499 F3d 360, 364 (4th Cir 2007):

*Burford* permits abstention when federal adjudication would unduly intrude upon complex state administrative processes because either: (1) there are difficult questions of state law . . . whose importance transcends the result in the case then at bar; or (2) federal review would disrupt state efforts to establish a coherent policy with respect to a matter of substantial public concern. . . . Courts must balance the state and federal interests to determine whether the importance of difficult state law questions or the state interest in uniform regulation *outweighs* the federal interest in adjudicating the case at bar.

(quotation marks omitted) (emphasis in original).

<sup>267</sup> See *Younger*, 401 US at 44 (describing comity as "sensitivity to the legitimate interests of both State and National Governments").

Not only are comity interests weak in the context of the Act, but finality interests are weak as well. The interest in finality—that is, in foreclosing litigants’ opportunities for a second bite at the apple—still retains its typical justifications of preventing forum shopping and avoiding potentially costly relitigation of already-decided issues. This justification, however, is weakened in this context. If litigants know that federal courts have the ability to reevaluate a state courts’ judgment, then rational litigants that desire to minimize litigation costs will either bring their federal claims in federal court at the outset or invoke removal, avoiding state resolution of federal law claims altogether. Thus, overall litigation costs and the impact on the interest in finality should be minimal.

In addition, finality in this context comes at the cost of potentially forcing plaintiffs to choose between litigating state claims in state court or litigating federal claims in federal court, at the risk of being unable to do both. This is because while plaintiffs may attempt to avoid litigation of federal claims in state court, the state court may rule on them anyway. Application of § 1738 would therefore bar litigants from being able to fully litigate their federal claims. This is precisely what occurred in *Communications Telesystems*.<sup>268</sup> In that case, the plaintiff was forced by California law to either appeal a state agency adjudication to the California Supreme Court or lose the chance to appeal its state law claims entirely.<sup>269</sup> As a result, the plaintiff filed both a state appeal for its state claims—which did not include any federal law claims involving the Act—and a new lawsuit in federal court to resolve its federal claims.<sup>270</sup> The California Supreme Court denied the plaintiff’s petition;<sup>271</sup> this denial was functionally equivalent to a final judgment on the merits under state law.<sup>272</sup> When the Ninth Circuit held that § 1738 barred review of the plaintiff’s claims alleging that the state agency had violated the Act,<sup>273</sup> the court effectively barred any federal or state court from reviewing the plaintiff’s federal claims. Application of § 1738 and finality can thereby create a lose-lose situation

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<sup>268</sup> Note that the plaintiff in *Sprint Communications* was also originally forced to involuntarily litigate its federal claims in state court through the misapplication of *Younger* abstention. *Sprint Communications, Inc v Jacobs*, 134 S Ct 584, 588–90, 593–94 (2013).

<sup>269</sup> *Communications Telesystems*, 196 F3d at 1016–18.

<sup>270</sup> *Id* at 1014–16.

<sup>271</sup> *Id* at 1015.

<sup>272</sup> *Id* at 1018–19.

<sup>273</sup> *Communications Telesystems*, 196 F3d at 1018–19.

for litigants, who are forced to either involuntarily litigate their federal claims in state court or run the risk of having the state court's decision bar federal review. It also creates situations in which, as in *Communications Telesystems*, federal claims involving the Act go entirely unreviewed. Weighing these lessened finality costs against the "enormous negative" harms to federal telecommunications regulation<sup>274</sup> and state autonomy demonstrates that finality does not support the application of § 1738 and res judicata.

As already discussed, application of res judicata allows a return to the state-by-state regulation that the Act was designed to correct.<sup>275</sup> Telecommunications services are inherently interstate.<sup>276</sup> State-by-state regulation creates instability and uncertainty.<sup>277</sup> This decreases investment and innovation by increasing companies' regulatory compliance costs and generating uncertainty.<sup>278</sup> Furthermore, due to their lack of national perspective, state regulators are "institutionally incompetent" to regulate telecommunications services and externalities that are national in scope.<sup>279</sup> Thus, state regulators are "doomed to reach incomplete and often inconsistent conclusions based on their own parochial interests."<sup>280</sup> Federal oversight is therefore essential.<sup>281</sup>

In sum, the policy rationale behind res judicata is greatly weakened in the context of the Act. While implicit repeal of § 1738 may have some costs for federal-state comity and for removing finality from some state court decisions, these costs are outweighed by the overall costs of imposing res judicata.

#### IV. IMPLICATIONS FOR OTHER FEDERAL REGULATORY REGIMES AND RES JUDICATA

If the 1996 Act overrides res judicata of state adjudications, what other federal regulatory regimes may also do so? To date,

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<sup>274</sup> *GTE North*, 209 F3d at 918–19 (detailing the harm of barring federal review of state actions).

<sup>275</sup> See *Illinois Bell Telephone Co v Worldcom Technologies, Inc*, 179 F3d 566, 568 (7th Cir 1999) ("Through the Telecommunications Act of 1996 Congress has opened the door to competing local exchange carriers and has inserted both the [FCC] and the federal courts into the previously state-regulated monopoly.").

<sup>276</sup> See Cooper and Koukoutchos, 6 J Telecomm & High Tech L at 346–47, 353 (cited in note 63).

<sup>277</sup> See id at 352–53.

<sup>278</sup> See id at 352.

<sup>279</sup> Id at 353–54 (emphasis omitted).

<sup>280</sup> Cooper and Koukoutchos, 6 J Telecomm & High Tech L at 353 (cited in note 63).

<sup>281</sup> See id at 353–55.

general characteristics of claims and statutes that may necessitate disregard or modification of res judicata have not been examined by scholars.<sup>282</sup> Although the answer requires detailed analysis and evaluation of individual statutes, a few general characteristics can be gleaned from the 1996 Act that indicate when a statute may require that federal courts be able to review state decisions. These characteristics include the necessity of a uniform national policy to achieve a statute's goals, limitations on state authority, and preservation of state authority.<sup>283</sup> Using these characteristics, it may be possible to identify other statutes that require federal courts not be bound by state adjudications.

#### A. The Statute Requires Uniformity to Function

First, if a statute is meant to solve national problems that require uniformity, then a statute may overcome federal common law preclusion and implicitly repeal § 1738. Specifically, a statute may require federal review if allowing states to operate independently on an issue would create opportunities for arbitrage, allow for cross subsidization that distorts competition, produce interstate spillover effects, or result in other problematic inconsistency. This is likely because otherwise, without uniformity, the statute would not be able to accomplish its goals as intended by Congress. Accordingly, applying res judicata to state adjudications may create inconsistency contrary to Congress's intent.

One example of this is the Federal Aviation Act of 1958.<sup>284</sup> The Federal Aviation Act is meant to provide for both safe and efficient national air travel through the implementation of a uniform national regulatory scheme.<sup>285</sup> This likely requires a uniform policy for two separate reasons. First, for safety reasons, it is necessary to have uniform standards governing how aircraft may be operated—specific flight paths, heights, takeoff and landing procedures, safety standards, and so forth. Because a

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<sup>282</sup> The only academic work in this area has focused on specific claims or statutes and has not addressed more-general considerations. See, for example, William V. Luneburg, *Claim Preclusion as It Affects Non-parties to Clean Air Act Enforcement Actions: The Ghosts of Gwaltney*, 10 *Widener L Rev* 113, 130–34 (2003) (asserting that the Clean Air Act may implicitly repeal § 1738); Mollie A. Murphy, *The Intersystem Class Settlement: Of Comity, Consent, and Collusion*, 47 *U Kan L Rev* 413, 486–91 (1999) (asserting that the Supreme Court should revisit and reverse its application of § 1738 to class action settlements).

<sup>283</sup> For an explanation of how these three characteristics are embodied in the Act, see Part III.A.2.

<sup>284</sup> Pub L No 85-726, 72 Stat 731, codified as amended at 49 USC § 40101 et seq.

<sup>285</sup> See 49 USC § 40101.

significant portion, if not a majority, of air travel is interstate, a patchwork of state regulations would likely be unacceptable. A unified national regime of regulation is therefore necessary. Second, because the air-travel market operates largely as a regulated oligopoly, competitive policies must be consistent.<sup>286</sup> If airlines received favorable subsidization in certain states, it could allow them to leverage such advantages into other markets, undermining competition. Conversely, too few subsidies or overly restrictive regulation may cause certain geographic areas to be underserved. Thus, it would seem that a national policy is necessary to achieve Congress's goal of implementing a safe and efficient civil aviation system. Allowing state agencies and courts to independently interpret and implement federal policy without federal review could create costly inconsistency. This is why two circuit courts have already found federal common law preclusion to be inapplicable in the context of federal aviation regulation.<sup>287</sup>

Another example is the Clean Air Act,<sup>288</sup> which was intended to set a national air pollution policy.<sup>289</sup> Without the national uniformity provided by the statute, responsibility for regulating air pollution would fall on each of the individual states. The states, however, are unlikely to be the best regulators of such problems.<sup>290</sup> First, air pollution is not solely an intrastate problem.<sup>291</sup> One state's air pollution can quickly become another's. This creates a spillover problem that would be difficult and complicated for states to address on their own because each individual state may lack authority over all of the pollution sources that affect it. Second, air pollution is a classic collective action problem.<sup>292</sup> While all states together may have incentives to maintain high

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<sup>286</sup> See *Arapahoe County Public Airport Authority v Federal Aviation Administration*, 242 F3d 1213, 1220–21 (10th Cir 2001) (claiming that giving preclusive effect to state court judgments would “lead to inconsistent enforcement of the federally mandated assurances, potentially jeopardizing the efficiency and equality of access to our Nation’s air transportation system”).

<sup>287</sup> See *id.* at 1221; *American Airlines, Inc v Department of Transportation*, 202 F3d 788, 800–01 (5th Cir 2000).

<sup>288</sup> Pub L No 88-206, 77 Stat 392 (1963), codified as amended at 42 USC § 7401 et seq.

<sup>289</sup> 42 USC § 7401.

<sup>290</sup> For a more in-depth discussion of why the states may not be able to effectively regulate air pollution, see Douglas R. Williams, *Cooperative Federalism and the Clean Air Act: A Defense of Minimum Federal Standards*, 20 SLU Pub L Rev 67, 97–112 (2001).

<sup>291</sup> See Robert L. Glicksman and Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 Nw U L Rev 579, 594–96 (2008) (describing the presence of pollution externalities as justifying federal regulation).

<sup>292</sup> See *id.* at 597–98 (describing the potential for a “race to the bottom”).



air-quality standards, each individual state stands to benefit from adopting lower standards—both by imposing lower regulatory costs on citizens and businesses and by free riding off the antipollution measures taken by other states.<sup>293</sup> Thus, allowing state agencies and courts to bind the EPA and federal courts when it comes to federal law and enforcement actions creates problematic inconsistency.<sup>294</sup>

#### B. The Statute Prohibits States from Acting Inconsistently with Federal Policy

The second characteristic that may signal Congress's intent to allow for federal review is that the statute prohibits states from acting inconsistently with federal policy. If the statute contains provisions that explicitly limit actions that states may take or creates federal guidelines for states to act in accordance with, then the statute may require federal review of state adjudications. In many ways, this characteristic is simply another manifestation of the first: to successfully implement a uniform national policy means that the states cannot act in ways contrary to that policy. Nevertheless, explicit limitations on state authority can be independently indicative of congressional intent to permit federal review of state adjudications—review that is necessary to ensure that the states do not exceed the bounds of their authority.

The Clean Air Act is again a good example of this. Specifically, 42 USC § 7416 prohibits the states from enforcing emissions standards that are less stringent than the federal standards. If, for example, state agencies or courts began crafting exceptions or enforcing looser standards than the federal policy calls for, then applying *res judicata* to those decisions would frustrate that federal policy. States may have incentives to shirk the burden of enforcing costly regulation in order to stimulate business or appease voters.<sup>295</sup> Thus, each state agency and court may have somewhat perverse incentives to undermine federal

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<sup>293</sup> Note that the externality problems presented here are analogous to the problems present in the telecommunications context. See Cooper and Koukoutchos, 6 J Telecomm & High Tech L at 353–55 (cited in note 63).

<sup>294</sup> For a more detailed version of this argument, see Luneburg, 10 Widener L Rev at 130–34 (cited in note 282).

<sup>295</sup> Williams, 20 SLU Pub L Rev at 107–09 (cited in note 290) (asserting that “federal environmental standards . . . prevent states from competing with each other for economic activity by relaxing environmental standards and thereby offering lower location costs to industry”).

regulation. If a state agency or court allowed a polluter to avoid punishment for regulatory infractions, allowing such a decision to bar a subsequent suit in federal court would violate the statute's restrictions on state authority.<sup>296</sup> Such a limitation therefore suggests that state adjudications may not be *res judicata* in federal court under the statute.<sup>297</sup>

### C. The Statute Preserves Authority among the Individual States

Finally, if a statute preserves authority for states to act independently on a given issue, then it may indicate that the statute necessitates that *res judicata* does not apply to federal review. Application of *res judicata* could prevent states from acting independently if one state decided an issue and then another state tried to act differently.<sup>298</sup> This, however, is entirely dependent on what issues state agencies and courts may be reviewing, because not all preservations of state authority will necessitate federal review. If the state adjudications are themselves fact dependent, then such decisions may not bind other states, given the unique nature of each litigation. Indeed, for a strong majority of legal issues, one state court's decision is not binding on other courts. This problem exists in telecommunications regulation because of the numerous identical questions of law and fact that predominate the field—for example, interconnection agreements can be verbatim from state to state, so that one state's interpretation of an agreement has the potential to bind a later state.<sup>299</sup> As a result, issues for which states are likely to address common questions of law or identical factual problems are most likely to feature this characteristic.

### CONCLUSION

The 1996 Act revolutionized telecommunications in many ways. The Act moved regulation away from protecting monopolists to mandating competition. Further, it flipped telecommunications

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<sup>296</sup> See, for example, 42 USC § 7416 (providing that a state cannot “enforce any emission standard . . . less stringent” than the federal standard).

<sup>297</sup> *Arapahoe County*, 242 F3d at 1219–20 (holding that “common law doctrines extending full faith and credit to state court determinations” do not apply when those determinations are “contrary to important and established federal policy”).

<sup>298</sup> See note 211 and accompanying text.

<sup>299</sup> See, for example, *Global NAPs*, 427 F3d at 43, 47–49 (explaining that individual state courts have decisionmaking authority over identical interconnection agreements).

regulation on its head by transferring authority from the states to the federal government. In these ways, the Act upended long-standing, traditional regulation. One of these traditions is the federal courts' application of *res judicata* to state adjudications. In the Act, Congress manifested its intent to implement a uniform federal telecommunications policy. The Act protects this important goal of uniformity by restricting states from acting in any way that contravenes federal regulation. At the same time, the Act preserves for the states the ability to regulate certain issues that do not affect federal policy. Application of *res judicata* would conflict with and undermine these important principles and provisions of the Act. Accordingly, federal common law should not bind federal courts to the results of state agency adjudications. Further, though implicit repeals are exceedingly rare, the Act presents a strong case that the Court should recognize implicit repeal of § 1738 in this context.

These three characteristics of the Act—the necessity of a uniform policy, the limitation of states' authority, and the preservation of states' authority—that reflect Congress's intent to allow federal review are also generally applicable to other statutes beyond the 1996 Act. Although any analysis of congressional intent requires in-depth review on a case-by-case basis, these characteristics are useful indicators of statutes that potentially necessitate that state adjudications not preclude federal review.